CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1931

R. A. CHILDS, L. D. CHILDS, JANIE C. PHIFER AND MARGARET CHILDS v. WARNER BROTHERS SOUTHERN THEATRES, INC.

(Filed 18 February, 1931.)

Landlord and Tenant D b—Lessee assigning lease held liable to lessor for rent under terms of lease contract in this case.

Where a lease of real property expressly provides that the lessee, his heirs and assigns might not transfer the leased premises to another without the consent of the lessor, the restrictions do not solely apply to the original lessee, and where there are several and successive assignments of the lease, the consent of the lessor to one of these does not waive his right to withhold his consent to subsequent assignments, the respective lessees taking with notice of the express terms of the lease, and where after a series of such transfers the lessor notifies a lessee that the latter could not transfer the lease to another but upon condition that he remain liable for the rent according to the terms of the original lease, the condition under which the lessee may lease the premises is enforceable by the lessor.

CIVIL ACTION, before *Oglesby, J.*, at Spring Term, 1930, of MECKLENBURG.

The agreed facts are substantially as follows: Prior to 1 February, 1923, the Berkley Company, a corporation, owned certain property in the city of Columbia, known as No. 1426 Main Street, fronting on said street approximately 26 feet, and having a depth of approximately 125 feet. The property was used for the purpose of conducting a moving picture theatre. On 1 February, 1923, the Berkley Company leased said property to R. D. Craver for a period of five years, commencing 1 February, 1923, and ending 31 January, 1928. Thereafter the Berkley Company conveyed the property to the plaintiffs in this action. Subsequently, on or about 10 June, 1925, Craver, the lessee, "transferred and assigned said lease to Warner Bros. Southern Theatres, Inc." The transfer or assignment by Craver purported to convey "all right, title and interest of the undersigned" in and to said lease. The plaintiffs assented to said assignment. Thereafter Warner Bros. Southern Theatres, Inc., took charge of the property and occupied it until about 28 January, 1926, when they reassigned said lease to Carolina Theatres, Inc. The Carolina Theatres, Inc., took possession of the property and occupied the same until said corporation was placed in the hands of a receiver. Warner Bros. Southern Theatres, Inc., paid all rent that accrued up to the time they reassigned said lease to Carolina Theatres. When Warner Bros. Southern Theatres, Inc., assigned the lease to Carolina Theatres they notified the plaintiff of such assignment. Whereupon, the plaintiff notified said Warner Bros. Southern Theatres, Inc., as follows: "If it is your desire to have the Carolina Theatres, Inc., remit the rent direct to me, that will be satisfactory, but I shall continue to recognize you as the lessee of the property now occupied by the Broadway Theatres and expect you to see that the payments are made promptly in accordance with the lease." The amount of rent accrued and unpaid is $450.

The original lease between the Berkley Company and Craver specified: (a) "that said Berkley Company, Inc., has granted and leased, and by these presents does grant and lease unto the said R. D. Craver, lessee, the two-story building situate, lying and being on the eastern side of Main Street," etc.; (b) "to have and to hold the said premises unto the said R. D. Craver, his executors, administrators and assigns for the full term of five years," etc.; (c) "said R. D. Craver, his executors, administrators and assigns for and in consideration of the above letten premises hereby covenant and agree to pay to the said Berkley Company, Inc., its successors and assigns the above-stipulated rent in the manner herein required"; (d) "if the said lessee shall at any time fail or neglect to perform any of the covenants hereunto contained and on his part to be performed, or shall be adjudged a bankrupt, or insolvent, then and in that event the lessor shall have the right to reënter into and upon the demised premises," etc.; (d) "lastly, it is agreed that the said R. D. Craver shall not convey this lease or underlet the premises without the written consent of the lessors," etc.

Upon the foregoing facts the trial judge was of the opinion that the defendant assignee was liable for the rent and so adjudged, from which judgment the defendant appealed.

J. L. Delaney for plaintiff.
A. B. Justice for defendant.

BROGDEN, J. If a lessor executes a lease to a given lessee, and the lease provides that the lessee shall not convey the lease nor underlet the premises without the written consent of the lessor, and thereafter the lessor consents to an assignment of the lease, can such assignee subsequently make a valid reassignment of the lease without the consent of the lessor?

In 1603 the English courts decided *Dumpor's case,* which is reported in 4 Coke, 119, Smith Leading Cases (8th ed.), 95. In that case a lease was made to a lessee and the lease provided that the lessee or his assigns should not alienate the premises to any one without special license of the lessors. Subsequently the lessors consented that the lessee might assign the lease, and in consequence thereof the lessee assigned to one Tubbe. It was held that the assignee Tubbe had a right to assign the remainder of the term to any person whomsoever, irrespective of the consent of the lessors upon the ground that the condition in the lease prohibiting assignment without the consent of the lessor was entire, consequently the assent to assignment having once been given, the whole condition was wiped out, and the assignee was at liberty to assign the lease to whomsoever he pleased. In other words, if a lessor once gives his assent to an assignment, such assent is deemed to be a waiver of the provision prohibiting assignment and the control of the lessor over his property is forever gone. The *Dumpor case* was followed in England and perhaps crossed the Atlantic in the Mayflower and took root in America because many of the earlier cases in the American courts followed the reasoning and applied the doctrine announced by the English courts. However, some of the courts, in order to avoid the application of the principles in the *Dumpor case,* began to draw a distinction between covenants in a lease which were single and covenants which were multiple. That is to say, if the covenant against assignment operated only upon the lessee and did not extend to his heirs and assigns, the covenant or condition was said to be single; but if the covenant against assignment without the written assent of the lessor operated not only upon the lessee but upon his heirs and assigns, the covenant is properly deemed to be multiple. Many courts took the position that if the covenant was single, *Dumpor's case* applied; but if the covenant was not single, *Dumpor's case* did not apply. The whole question is discussed and the authorities assembled in *Investors' Guaranty Corporation v. Thompson,* 225 Pac., 590, 32 A. L. R., 1071. See, also, *Spitz v. Nunn,* 171 N. E., 117; *Klein v. Niezer,* 169 N. E., 688; *Gusman v. Mathews,* 163 N. E., 636. See, also, *Keith v. McGregor,* 259 Southwestern, 725, 36 A. L. R., 311.

In the case at bar the lease in the habendum clause expressly included the lessee and his assigns. Moreover, the lessee and his assigns agreed to pay the rent, and upon failure to pay the rent, the lessor expressly reserved the right of reëntry upon the premises. Without entering into any discussion of the distinctions which may exist between single and multiple covenants and the great learning with which various views are elaborated, it is deemed sufficient to say that a reasonable construction of the lease involved in this case leads to the conclusion that the restriction against assignment and subletting operated upon the heirs and assigns of the lessee as well as upon the lessee himself. The covenant to pay rent is continuous in its nature, and such covenant is binding by express provision upon the assigns of the lessee, and all persons occupying the premises under the assignment from the lessee were charged with notice of the conditions imposed by the writing under which they held title to the premises. Therefore, we hold that by consenting to one assignment the lessor did not waive the conditions of the lease and did not consent that thereafter any subsequent assignee could turn his property over to the use and occupancy of any undesirable or irresponsible person without his approval. Indeed, when the defendant notified the plaintiff of its purpose to reassign the lease, the plaintiff gave express notice that it would still hold the defendant liable for the rent. *Krider v. Ramsay,* 79 N. C., 354; *Alexander v. Harkins,* 120 N. C., 452, 27 S. E., 120; *Garbutt & Donovan v. Barksdale-Pruitt Junk Co.,* 139 S. E., 357; *Millinery Co. v. Little-Long Co.,* 197 N. C., 168, 148 S. E., 26.

Affirmed.

QUINTON M. WIGGINS ET AL. v. MRS. ISA C. HARRELL ET AL.

(Filed 18 February, 1931.)

1. **Parties B a—Trustee is necessary party in action to declare mortgage given by him on trust property invalid.**

   Where a will devises and bequeaths all the testatrix's property of whatsoever kind to the children of the testatrix in trust, naming the husband as trustee with full power of sale, reinvestments, etc., in their behalf, and the beneficiaries thereunder bring an action to restrain or set aside a foreclosure sale under a mortgage given by the trustee on the lands affected by the trust: *Held,* the trustee's interest in the result of the suit makes him a necessary party thereto, and where he has not been made a party either plaintiff or defendant the Supreme Court on appeal will not decide the case presented upon the sole question as to whether his mortgage given upon the lands falls within the authority vested in him under the will, and consequently whether the sale was valid or otherwise.

2. Parties B b—Where necessary party will not join as plaintiff he may be made a party defendant.

Where a necessary party to an action will not join with the plaintiffs therein, they may have him made a party defendant when necessary for a final adjudication of the matters involved.

APPEAL by plaintiffs from *Harris, J.*, at July Term, 1930, of GATES. Affirmed.

Mrs. Lallah B. Wiggins was the owner of the real property described in the complaint. She became indebted to S. I. Harrell in the sum of $6,500, and to secure its payment she and her husband, John E. Wiggins, on 1 August, 1912, executed a mortgage or deed of trust on the land in controversy. She died on 17 January, 1918, leaving a will containing the following terms:

"1. I give and bequeath to my children, viz.: John Bynum Wiggins, Quinton M. Wiggins, Laura M. Wiggins, Raymond G. Wiggins, and Mary E. Wiggins, all of my property of every description, consisting of real, personal and mixed property, to them and their heirs absolutely and in fee simple.

2. I hereby appoint my husband, John E. Wiggins, a trustee to manage and control all of my said property during the period of his natural life, for the interest and benefit of my said children, the said management to be left entirely to the judgment and discretion of the said trustee, and I direct that no bond be required of the said trustee in the management and control of my said estate.

3. It is my will and desire that should my said husband John E. Wiggins, trustee as aforesaid, at any time after my death consider a sale of my land and premises to be for the best interest of my children, then and in that event, I do hereby invest him the said John E. Wiggins, trustee, as aforesaid, with full power and authority to sell and convey the same and to invest the proceeds arising from said sale for the benefit of my said children and in the management of said sale and in the investment of said proceeds, it is my will and desire that the said John E. Wiggins, trustee, aforesaid, be not required to enter into any bond for the faithful performance of the trusts herein reposed in him."

The plaintiffs alleged that on 14 January, 1919, John E. Wiggins, trustee for the heirs of Lallah B. Wiggins, borrowed $6,000 and executed to S. I. Harrell, trustee, a bond therefor payable 1 January, 1920, and a deed of trust on the land above described.

S. I. Harrell died in June, 1928, and thereafter Isa C. Harrell, his administratrix, sold the land under and by virtue of both deeds of trust and Costen J. Harrell became the purchaser at the price of $8,600. On the note secured by the deed of trust dated 1 August, 1912, there was an unpaid balance of $3,000. It was admitted that this amount should be paid out of the proceeds of the sale; but the plaintiffs contend that John E. Wiggins, trustee, had no legal right to encumber their land with a mortgage or deed of trust. They ask that an accounting be had and that they recover against Isa C. Harrell individually and as the personal representative of S. I. Harrell, trustee, the difference between the purchase price and the amount due on the bond and deed of trust executed 1 August, 1912.

At the close of the plaintiffs' evidence the action was dismissed as in case of nonsuit. Judgment for the defendants. Exception and appeal by the plaintiffs.

Thad Eure and Stanley Winborne for plaintiffs.
Costen & Costen and Ehringhaus & Hall for defendants.

ADAMS, J. The relief sought in the complaint first filed by the plaintiffs was an order to restrain the defendants from selling the land under the deed of trust executed by John E. Wiggins, trustee. Judge Midyette issued a temporary restraining order and Judge Small announced his purpose to continue it to the final hearing upon certain conditions. Failure of the plaintiffs to comply with the conditions effected a dissolution of the order. In consequence the land was sold under both deeds of trust at the price of $8,600. The administratrix of S. I. Harrell applied $3,000 of this amount in satisfaction of the first note, and the plaintiffs by an amended complaint seek in this action to recover the remainder.

The basis of this claim is the alleged want of power on the part of John E. Wiggins, trustee in the will of Lallah B. Wiggins, to execute a valid mortgage on the land. The brief of the plaintiffs is addressed to the single question whether under the terms of the will the trustee had power to borrow money and secure its payment by a mortgage on property which was to be held in trust for their benefit.

This, in our opinion, is not the decisive question. Let us concede, without deciding, that the trustee had no right to execute the mortgage and that the plaintiffs have an interest in the controversy which in a proper action the courts would protect. The trustee is not a party; he is neither a plaintiff nor a defendant. Presumably, the plaintiffs preferred not to make him a party; but if he was unwilling to join them in the prosecution of the action they could have included him among the defendants. C. S., 457.

Is he a necessary party? The testatrix, Lallah B. Wiggins, appointed him a trustee to manage and control all the devised property for the interest and benefit of her children during the period of his natural life—"the said management to be left entirely to the judgment and discretion of the said trustee." He is living. If, therefore, the mortgage should be declared void the restored property must be returned to the trustee for management during his natural life, unless upon good cause he be duly removed. It could not be turned over to the plaintiffs without disregard of the express terms of the will. If the relief sought by the plaintiffs should be granted, that is, if the mortgage should be set aside, the rights of the trustee would necessarily be involved, because he would be entitled to the fruits of the litigation.

"Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in." North Carolina Prac. & Procedure, sec. 209. Any decree that might be rendered in this action would necessarily affect the interests of the trustee under the will. If he had a right to make the mortgage, the sale divested him of the legal title to the mortgaged property; if he had no such right other questions affecting his interests would at once arise. It may therefore be said that he is a necessary party.

Defect of parties appearing upon the face of the complaint must be pointed out by demurrer; otherwise the defect will usually be deemed to have been waived. *Lanier v. Pullman Co.*, 180 N. C., 406. But for defects in the merits of an action the defendant may demur, or file an answer and go to trial on the merits, and then move to dismiss. North Carolina Prac. & Procedure, sec. 455.

It seems to be obvious that the plaintiffs purposely declined to make the trustee under the will a party to the action and that they now rest their right to recover the controverted property as the beneficial owners without regard to the legal or equitable rights of the trustee. By this method they undertake to exclude him entirely and to assert as a meritorious cause of action their right to succeed to whatever title he would have if the mortgage should be decreed to be ineffective. The allegations in the complaint, if established, would not entitle them to the relief sought. Objection to the merits were not waived by the defendants' failure to demur.

The record presents other defenses of a serious nature, which we deem it unnecessary to consider. Judgment

Affirmed.

D. V. LEE v. ADDIE PENLAND ET AL.

(Filed 18 February, 1931.)

1. **Trial D a—Defendant must renew motion of nonsuit at close of all evidence in order to present question on appeal.**

   Where a defendant makes a motion as of nonsuit at the close of the plaintiff's evidence, and upon the motion being overruled, introduces evidence in his own behalf, he waives his right to present the question of the sufficiency of the evidence to go to the jury by failing to renew his motion at the close of all the evidence, and his appeal will be regarded as if no motion had been made by him. C. S., 567.

2. **Trial G a—After court has refused to grant motion of nonsuit he may not set aside verdict for insufficiency of evidence as matter of law.**

   Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, but may do so only as a matter within his discretion.

APPEAL by plaintiff from *Barnhill, J.,* at May Term, 1930, of BUNCOMBE. Affirmed.

Action to recover damages for personal injury. In her complaint the plaintiff alleged that on the occasion complained of the defendants owned and had in charge an apartment house on Ravenscroft Drive, in the city of Asheville, that each of the defendants was an agent of the other, and that she was a renter for pay of one of the apartments. It was afterwards admitted that Addie Penland owned the building. The house is situated on an elevation 15 or 20 feet above the street and has an approach of concrete steps without banisters. The plaintiff alleged that on the landing at the top of the steps the defendants kept a worn and raveled mat or rug which was "hazardous, dangerous, and unsafe for the plaintiff," who had occasion to use it in going to and from her apartment, and that on 12 October, 1929, when she was going from the house to the street her foot was caught in the raveled mat and she was thrown down the steps and seriously injured. She set forth as the proximate causes of her injury:

1. The carelessness and negligence of the defendants in failing to provide a hand railing or banister along the sides of said steps by which the plaintiff could have steadied herself and could have held and avoided the accident hereinbefore complained of.

2. The carelessness and negligence of the defendants in placing and maintaining, or causing to be placed and maintained, a worn, raveled and dangerous rug or mat on the high landing of the steps.

The defendants denied that the plaintiff was injured by their negligence, alleged that J. A. Penland had nothing to do with the accident and owed no duty to the plaintiff, and pleaded contributory negligence.

The plaintiff offered evidence and rested; the defendants moved for judgment of nonsuit; the motion was allowed only as to J. A. Penland; the other defendant excepted.

The plaintiff was allowed, in the court's discretion, to offer other testimony. At its close Addie Penland again made a motion for nonsuit, which was refused, and she excepted. Thereupon she offered evidence. The plaintiff testified in rebuttal and the evidence was closed; but the defendant did not renew her motion for judgment of nonsuit at the close of all the evidence.

In response to the issues the jury found that the plaintiff's injury was caused by the negligence of Addie Penland; that the plaintiff did not negligently contribute to her injury, and that she was entitled to damages, which were assessed.

The defendant moved to set aside the verdict and the judge made the following order: "The court sets aside the verdict upon the first issue in this cause as a matter of law and assigns as his reason therefor that there is not sufficient evidence appearing in the record to sustain the answer to said issue."

The plaintiff excepted and appealed.

Johnson, Smathers & Rollins for plaintiff.
Merrimon, Adams & Adams for defendant.

ADAMS, J. When the plaintiff in a civil action has introduced his evidence and rested his case the defendant may move for dismissal of the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal; if it is not allowed the defendant may except, and if he introduces no evidence the jury shall pass upon the issues, and he may have the benefit of the latter exception on appeal. A motion for dismissal or for judgment of nonsuit made at the close of the plaintiff's evidence and not renewed at the close of all the evidence is waived. *Earnhardt v. Clement,* 137 N. C., 91; *Teal v. Templeton,* 149 N. C., 32; *Wooley v Bruton,* 184 N. C., 438; *Nowell v. Basnight,* 185 N. C., 142. Indeed, by introducing evidence a defendant waives the exception taken when the plaintiff rested his case. *Smith v. Pritchard,* 173 N. C., 720.

In this action the defendant not only introduced witnesses; she failed to renew her motion for nonsuit at the close of the evidence. We must, therefore, treat the appeal as if the defendant had made no motion to dismiss the action.

An objection that there is not sufficient evidence on an issue must ordinarily be made before verdict; it is too late after verdict first to question the sufficiency of the evidence. This is the uniform rule of practice. *Fagg v. Loan Association,* 113 N. C., 364; *S. v. Kiger,* 115

N. C., 746; *Holden v. Strickland,* 116 N. C., 185; *Sutton v. Walters,* 118 N. C., 495; *S. v. Harris,* 120 N. C., 577; *Hart v. Cannon,* 133 N. C., 10; *Mincey v. Construction Co.,* 191 N. C., 548. This may be assigned as one of the reasons why the plaintiff may not take a voluntary nonsuit after a verdict has been returned against him. C. S., 604.

Cogent reason for adhering to this practice is found in the provisions of section 567 of the Consolidated Statutes, under which the defendant in an action is given ample opportunity before verdict to question the adequacy of the evidence, and to present for decision and by exception to reserve for review all relevant questions of law. We have held that where issues are answered in favor of the plaintiff in an action for personal injury, the trial court, having denied a motion for nonsuit duly made in accordance with the statute, may not defeat the plaintiff's recovery by thereafter holding that there was no causal relation between the defendant's negligence and the plaintiff's injury *(Morgan v. Owen, ante,* 34); also that the trial court, after denying a motion for nonsuit and accepting a verdict in the plaintiff's favor, may not ordinarily set the verdict aside for want of evidence as a matter of law. *Godfrey v. Coach Co., ante,* 41.

In the present case the defendant waived her right to move before verdict that the action be dismissed for insufficiency of the evidence, and after the verdict was returned the judge was remitted to the exercise of his discretion on the question of vacating the verdict. In *S. v. Kiger, supra,* it is said that if the presiding judge is of opinion that the verdict is against the weight of the evidence, or that the evidence was insufficient, he is vested with the power to set aside the verdict and grant a new trial, and that the exercise of such power is a matter of discretion.

The cause is remanded to the end that such discretion be exercised and that further proceedings be had in accordance with this opinion.

Error and remanded.

STATE v. PERRY ROSE.

(Filed 18 February, 1931.)

1. **Intoxicating Liquor B a—Where whiskey is found in constructive possession of defendant it is sufficient to raise presumption against him.**

   Where the officers arresting the accused for violation of the prohibition law find at the time of the arrest whiskey in sufficient quantities hid under a loose board in his store, the whiskey is in his constructive possession, and the fact is sufficient to raise the presumption that he had it for the purpose of sale.

2. **Criminal Law I g—Refusal of requested instructions in this case held not to constitute reversible error.**

Where evidence of the unlawful possession of intoxicating liquor by the defendant on trial for violating our prohibition law is uncontradicted and sufficient for conviction, and the defendant offers no evidence, a charge of the judge to the jury to convict the defendant if they found the defendant guilty beyond a reasonable doubt is correct, and in the instant case the refusal to comply with the unwritten request to charge upon the presumption of innocence, made at the conclusion of the charge, and the refusal to state defendant's contentions is held not to be prejudicial error entitling the defendant to a new trial, C. S., 565, 566, the charge being in substantial compliance with C. S., 564.

APPEAL by defendant from *Cranmer, J.,* at December Term, 1930, of WILSON. No error.

Defendant was tried and convicted in the police court of the town of Wilson on a warrant charging that defendant at the time and place stated in the warrant did unlawfully have in his possession intoxicating liquors for the purpose of sale. From the judgment of said court defendant appealed to the Superior Court of Wilson County.

At the trial in the Superior Court the evidence offered by the State tended to show that on or about 12 July, 1930, two police officers of the town of Wilson went into the store of the defendant, located within the corporate limits of said town; that defendant and several other persons were present when the officers entered the store; that one of the officers informed the defendant that he had a search warrant authorizing and directing him to search the defendant's store and premises for intoxicating liquors; that defendant replied that there was not a drop of whiskey in his store or on his premises, and that the officers could proceed with their search without reading the warrant to him; that thereupon the officers went to the rear of defendant's store, and there found under a loose plank in the floor one and a half gallons of whiskey in half-gallon jugs, and six pint bottles. One of the officers testified that he had searched the place where the whiskey was found three days before and at that time no whiskey was found there. When defendant was arrested and taken by the police officers to the police station, Alonzo Owens was left in charge of defendant's store. Alonzo Owens was in the store with defendant when the officers first arrived there. Defendant told the officers that the whiskey found by them in his store did not belong to him, and that he did not know that the whiskey was in his store.

Defendant offered no evidence. In the charge to the jury the court said: "I instruct you if you find beyond a reasonable doubt, the facts to be as the evidence tends to show, to return a verdict of guilty."

At the conclusion of the charge, and before the jury retired to consider the case, counsel for defendant requested the court to instruct the jury as to the presumption of innocence, and also to state defendant's contention as to the law and the evidence. The court declined to do so, and defendant excepted.

The jury returned a verdict of guilty. From the judgment on the verdict defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

M. S. Strickland and A. O. Dickens for defendant.

CONNOR, J. The assignments of error on this appeal are based on defendant's exception to the refusal of the court to instruct the jury that defendant was presumed to be innocent of the crime with which he is charged in the warrant, and to state to the jury the contentions of the defendant, as requested by his counsel at the conclusion of the charge to the jury. This is the only exception appearing in the record, except the formal exception to the refusal of the court to set aside the verdict and grant a new trial.

The evidence offered by the State, if believed by the jury, was of sufficient probative value to establish the truth of the State's contention that at the time and place stated in the warrant the defendant had intoxicating liquor in his possession for the purpose of sale. *S. v. Myers,* 190 N. C., 239, 139 S. E., 600; *S. v. Ross,* 168 N. C., 130, 83 S. E., 307; *S. v. Lee,* 164 N. C., 533, 80 S. E., 405. There was no evidence tending to contradict the evidence for the State, or to impeach the witness for the State. There was evidence tending to show that the whiskey found by the officers in defendant's store was at least in his constructive possession. This was sufficient, for as was said in *S. v. Myers, supra,* "If the liquor was in the power of defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual." If the jury believed the evidence, and found beyond a reasonable doubt that the whiskey was in the possession of the defendant, then there was ample evidence that defendant had the whiskey in his possession for the purpose of sale.

In its charge the court had instructed the jury that if they found the facts to be as the evidence tended to show, beyond a reasonable doubt, they should return a verdict of guilty. Having correctly imposed upon the State the burden of proof beyond a reasonable doubt, the court declined to instruct the jury that defendant was presumed to be innocent. While the court might have well complied with the request of defendant's counsel, under the authority of *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374, we cannot hold that the refusal to give the instruction as requested was error for which the defendant is entitled to a new trial, as a matter of law. The request for the instruction was not in writing, and was first made after the court had concluded its charge to the jury. C. S., 565, and C. S., 566.

Nor was it error in the instant case for the court to refuse to state the contentions of the defendant after it had concluded its charge to the jury. The evidence consisted of the testimony of only one witness, whose testimony was not impeached on his cross-examination or otherwise. The law applicable to the facts shown by all the evidence is simple and plain. The charge was in substantial compliance with C. S., 564. We find no error for which defendant is entitled to a new trial. The judgment is affirmed.

No error.

J. T. DAVIS, ADMINISTRATOR, v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 18 February, 1931.)

Death B a: Judgments L a—In this case held: action against individual defendant was barred, he not being party to prior action nonsuited.

Where an action for wrongful death is brought against a corporate and an individual defendant more than one year after the date of the death, but within one year from the date of a voluntary nonsuit in an action brought within the year against the corporate defendant alone, the action is properly nonsuited as to the individual defendant, he not being a party to the first suit nor affected by the nonsuit therein rendered. C. S., 160, 415.

APPEAL by plaintiff from *Harris, J.*, at September Term, 1930, of CURRITUCK.

Civil action for wrongful death alleged to have been caused by the negligence of the defendants.

The facts challenged by demurrer are these: On 26 July, 1925, plaintiff's intestate was killed by the corporate defendant's locomotive in charge of H. A. Lewis, engineer. Within a year thereafter, plaintiff instituted a suit against the Norfolk Southern Railroad Company to recover damages for the said alleged wrongful death, which action, after removal to the Federal Court for trial, was terminated by voluntary nonsuit on the part of plaintiff. Within a year following said nonsuit in the Federal Court, but after the lapse of more than a year from the death of plaintiff's intestate, the present suit was instituted against the Norfolk Southern Railroad Company and H. A. Lewis.

From a judgment sustaining a demurrer interposed by the individual defendant and dismissing the action as to him, the plaintiff appeals, assigning error.

Ehringhaus & Hall for plaintiff.
Thompson & Wilson for defendant, H. A. Lewis.

STACY, C. J., after stating the case: As suit was not brought against H. A. Lewis within one year after the death of plaintiff's intestate, the demurrer interposed by him was properly sustained. *Tieffenbrun v. Flannery,* 198 N. C., 397, 151 S. E., 857. An action for wrongful death, brought under C. S., 160, is required to be instituted against the person or corporation liable therefor within one year after such death. *Bennett v. R. R.,* 159 N. C., 345, 74 S. E., 883.

That an action was brought against the Norfolk Southern Railroad Company within the time prescribed, and judgment of voluntary nonsuit entered therein, and the present action commenced against the Norfolk-Southern Railroad Company and H. A. Lewis within one year following said nonsuit, but after the lapse of more than a year from the death of plaintiff's intestate, while sufficient to save the case as against the corporate defendant *(Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586), will not avail the plaintiff as against the demurrer of the individual defendant who was not a party to the first suit. C. S., 415. See *Link v. R. R.,* 198 N. C., 78, 150 S. E., 672; *Murray v. R. R.,* 196 N. C., 695, 146 S. E., 801; *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533, and *Belch v. R. R.,* 176 N. C., 22, 96 S. E., 640; also *Motsinger v. Hauser,* 195 N. C., 483, 142 S. E., 589.

Affirmed.

SAMUEL A. BATCHELOR ET AL. v. AMERICAN NATIONAL INSURANCE COMPANY, OF GALVESTON, TEXAS.

(Filed 18 February, 1931.)

Insurance H d—Insured is entitled to difference between cash value of policy and outstanding loan thereon as of date of notice to cancel.

The holder of a life insurance policy who has borrowed money thereon, upon giving notice to the insurer to cancel the policy, is entitled only to receive the difference between the cash surrender value of the policy and the outstanding policy loan, and it is error for the trial judge to direct a verdict in a larger sum.

APPEAL by defendant from *Cranmer, J.,* at November Term, 1930, of NASH.

Civil action to recover the difference between the cash surrender value of a policy of life insurance and the outstanding policy loan, which difference, on 23 September, 1929, the annual premium date of said policy, amounted to $50.85.

It appears from the record that, after some correspondence between the parties as to the better course to pursue, the plaintiffs finally notified the defendant on 19 November, 1929, of their intention to surrender said policy and mailed release to that effect on said date.

Under the automatic premium-loan provision of said policy, the net cash value of the policy would have been consumed on 26 November, 1929, but not before.

From a directed verdict in favor of the plaintiffs for $50.85, the defendant appeals, assigning errors.

D. W. Perry for plaintiffs.
J. A. Edgerton and T. T. Thorne for defendant.

STACY, C. J., after stating the case: Plaintiffs are entitled to recover the difference, if any, between the cash surrender value of the policy and the outstanding policy loan on the date the defendant received notice of intention to surrender, but no more. It was error, therefore, to direct a verdict for a larger sum.

New trial.

ISAIAH GREEN ET AL. v. F. L. GLADSTONE, TRUSTEE, ET AL.

(Filed 18 February, 1931.)

Appeal and Error E h—Where parties agree that issue of indebtedness should be answered in certain sum question of usury becomes academic.

In an action to restrain the foreclosure of a mortgage on lands wherein, on the trial, it is admitted that the issue as to the amount of plaintiff's indebtedness should be answered in a certain amount, the question as to whether the plaintiff is entitled to a credit on the note for usurious charges becomes academic, and will not be decided on appeal.

APPEAL by plaintiffs from *Moore, Special Judge,* at November Civil Term, 1930, of MARTIN.

Civil action to restrain the foreclosure of a mortgage and to have the debt secured thereby credited with a forfeiture of the entire interest charged and twice the amount of usurious interest paid thereon.

On the hearing, the plaintiffs agreed that the issue of indebtedness "might be answered in the sum of $384 with interest from 26 January, 1929," which was done. Upon this admission, the court directed a verdict accordingly, dissolved the temporary restraining order, and dismissed the claim for forfeiture of interest and penalty for usury. Plaintiffs appeal, assigning errors.

A. R. Dunning for plaintiffs.
Wheeler Martin and B. A. Critcher for defendants.

STACY, C. J. The admission of the plaintiffs that the issue of indebtedness might be answered in the sum of $384 with interest from 26 January, 1929, which was done, brings the case under the decisions in *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334, and *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746, and renders the questions relative to forfeiture of interest and penalty for usury, debated on brief, academic, at least so far as the present record is concerned.

No error.

W. V. PARKER, ADMINISTRATOR OF MAGGIE F. GROVES, DECEASED, v. F. L. POTTER, ADMINISTRATOR OF JOHN A. GROVES, DECEASED, AND REBECCA J. GROVES.

(Filed 18 February, 1931.)

1. **Insurance N a—Where wife of insured is named beneficiary and insured kills his wife and himself the proceeds descend to heirs of wife.**

   Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, his heirs may not claim under him the proceeds of the policy since the law will not allow a man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to his heirs at law. C. S., 10, 2522, 137.

2. **Same—Mother of insured named beneficiary in case of prior death of wife held entitled to proceeds though insured murdered his wife.**

   Where a policy of life insurance by its express terms fixes the beneficiary as the mother of the insured in the event of the prior death of the insured's wife, and the insured feloniously kills his wife and then himself, the proceeds of the policy are payable to the insured's mother under the express provisions of the policy contract itself.

3. **Descent and Distribution B e—C. S., 2522 applies where it is admitted that husband feloniously killed wife.**

The provisions of C. S., 2522, denying to the husband or wife "convicted" of killing the other the right in the personal property of the other does not require a conviction of the offense where it is admitted that the homicide had been committed.

APPEAL by plaintiff and by defendant, F. L. Potter, administrator, from *Grady, J.*, at March Term, 1930, of DUPLIN.

A trial by jury was waived and the parties agreed upon the following statement of the facts:

1. J. A. Groves and his wife, Maggie Groves, were living together as man and wife at Magnolia, N. C.; they had no children, and on 3 April, 1929, the said J. A. Groves wrongfully, unlawfully and feloniously shot and killed his said wife, Maggie Groves, and thereafter committed suicide; the said J. A. Groves being at that time 55 years of age, and Maggie Groves being 44 years of age.

2. At the time of said homicide and suicide J. A. Groves had a policy of insurance in the Mutual Life Insurance Company of Maine for $1,000, which policy was payable to Maggie Groves, wife of said J. A. Groves.

At said time the said J. A. Groves had another policy of life insurance in the Woodmen of the World, which was payable to his wife, Maggie Groves, or in the event of her death, prior to that of J. A. Groves, to Rebecca J. Groves, the mother of the said J. A. Groves, she being the next of kin to J. A. Groves, and being the person named in said policy as beneficiary, in case of the death of the said Maggie Groves prior to the death of her husband. Said policy has been collected by the administrator of J. A. Groves, and the amount thereof, to wit, $1,000, is now on deposit in the bank to await the further orders of the court in this action.

The $1,000 policy issued by the Mutual Life Insurance Company of Maine has also been collected by F. L. Potter, administrator of J. A. Groves, and is now being held to await the further orders of the court in this action.

3. At the time of his death J. A. Groves owned real and personal property, and owed some debts, and there were mortgage liens upon his real estate; but the value of his real and personal estate and the amount of his debts cannot be ascertained at this time. It is agreed by all parties that this matter, in respect to the net value of said estate is to be reserved and passed upon by a jury, together with an issue as to damage for the wrongful death of the said Maggie Groves, but it is agreed that the court shall pass at this time upon the legal questions raised by the pleadings as to the respective interests of the parties in

and to the two policies of life insurance above referred to, and as to the interest, if any, of the administrator of said Maggie Groves, in and to the real and personal estate of her deceased husband.

There are four separate causes of action declared upon in the pleadings:

(a) W. V. Parker, administrator of Maggie F. Groves, claims to be the owner of the proceeds from the two life insurance policies hereinbefore referred to, as against the administrator of J. A. Groves, who also claims the proceeds from said two policies.

(b) W. V. Parker, administrator of Maggie Groves, also claims and alleges that he is entitled to recover from the estate of J. A. Groves, deceased, the value of the dower right of his intestate in and to the estate of J. A. Groves, also one-half of the personal estate as distributee under the statutes, and also $300 in addition thereto, representing the value of her year's support.

(c) Mrs. Rebecca J. Groves, the mother and nearest of kin to J. A. Groves, deceased, claims to be the owner in her own right of the $1,000 collected from the Woodmen of the World on the policy hereinbefore referred to.

(d) W. V. Parker, administrator of Maggie Groves, claims damages out of the estate of the said J. A. Groves on account of her wrongful death, which is admitted to have been caused by a felonious act on the part of J. A. Groves, deceased.

The court is requested to pass upon the contentions of parties in respect to causes (a), (b), (c) as named above; but as to cause (d), as set out above, it is agreed by all parties that this question may be postponed and tried before the court and jury at some subsequent term.

Upon the foregoing facts, the court is of the opinion that because of the felonious slaying of his wife, the estate of J. A. Groves is not entitled to any part of the proceeds collected by F. L. Potter, administrator, from the Mutual Life Insurance Company of Maine, but that the proceeds thereof should belong to W. V. Parker, administrator of the said Maggie Groves. The court is also of the opinion that the proceeds from the policy issued by the Woodmen of the World, and now in the hands of the defendant, J. A. Groves, deceased, is the property of the defendant, Rebecca J. Groves, who is admitted to be the beneficiary named in said policy, in the event of the prior death of the said Maggie Groves.

The court is also of the opinion upon the admitted facts that W. V. Parker, administrator of Maggie Groves, deceased, is not entitled to recover anything in this action in respect to the dower right of his intestate, or of any rights that she may have had as widow or distributee of the estate of the said J. A. Groves, and in respect to this cause of action the same is dismissed.

It was thereupon adjudged that the plaintiff recover of the defendant, F. L. Potter, administrator of John A. Groves, $1,000 collected by said administrator from the Mutual Life Insurance Company of Maine; that the defendant Rebecca J. Groves recover of said administrator $1,000 collected from the Woodmen of the World; that the plaintiff is not entitled to recover anything out of the estate of John A. Groves because of any dower right his intestate might have had or because she was the widow and a distributee of her deceased husband, and that the action for wrongful death be continued.

The plaintiff and the defendant F. L. Potter, administrator, excepted and appealed.

It was agreed by the parties that sections 4 and 5 in the policy issued by the Woodmen of the World are the only provisions applicable to the questions arising upon said policy. The sections are as follows:

"Section 4. Applications—Applications must be made on forms prescribed by the Sovereign Commander, stating the amount desired and naming the beneficiary and relationship to applicant, which beneficiary or beneficiaries shall be his wife, children, adopted children, parents, brothers and sisters, or other blood relations, or persons dependent upon the member. If the beneficiary named is not one of said class of persons, the certificate shall be null and void.

"Section 5. Beneficiaries—The beneficiary or beneficiaries shall be designated in every beneficiary certificate issued and shall be only of the class named above. In the event of the death of all the beneficiaries designated before the death of the member, if no new designation has been made, the benefits shall be paid to the surviving widow and surviving children of the member, share and share alike, provided such widow shall not be entitled to any benefits if she shall have been divorced; *provided further,* that if there be no surviving widow, the surviving children, if any, shall be entitled to all of such benefits, and if there be no surviving children, then the surviving widow, if any, shall be entitled to the benefits; but if there be no surviving wife or children, such benefits shall be paid to the next living relation of the member in the order named in class of beneficiaries named in paragraph 4 above, and those of the half blood shall share equally with those of the full blood."

It is admitted that since the hearing of this cause that F. L. Potter, administrator, has died, and that Nellie Susan Outlaw is now the duly qualified and acting administrator *de bonis non* of the said estate, and has by her own motion been made a party hereto.

Butler & Butler for plaintiff.

Beasley & Stevens, J. Faison Thomson, J. T. Gresham, Jr., and R. D. Johnson for defendants.

ADAMS, J. It is a fundamental maxim of the common law that no man should take advantage of his own wrong. Not only is the maxim based on elementary principles; it is firmly embedded in our jurisprudence, and as remarked by Broom, it admits of illustrations from every branch of legal procedure. Legal Maxims, 275. One of these illustrations is given in *Anderson v. Parker,* 152 N. C., 1, in which it is said that the beneficiary in a policy of insurance who has caused or procured the death of the insured under circumstances amounting to a felony will not be allowed to recover on the policy. As the Court observed, this wholesome doctrine has been uniformly upheld except where the interest involved was conferred by statute and the statute itself did not recognize any exceptions. 2 Couch, Cyc. of Ins. Law, 1018.

Conversely, if a husband insures his life for the benefit of his wife and afterwards feloniously takes her life neither he nor his estate will be permitted to profit by his wrong. "To permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act, would be contrary to public policy. And no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself. And, in applying this rule, no distinction can be made between a death caused by murder and one caused by manslaughter. Nor does the common-law right of succession by descent operate in favor of one who wilfully takes the life of his ancestor for the purpose of succeeding to his property rights. And the common-law right of a man to succeed to the property of his wife upon her death does not operate in favor of one who murders his wife. And the rule that the common-law doctrine of succession to property does not operate in favor of one who wilfully takes the life of his ancestor should apply against any person claiming through or under the slayer. Nor does a rule of law that a common-law right of succession to property does not operate in favor of one who wilfully takes the life of his ancestor contravene a constitutional provision that a conviction of crime shall not work a forfeiture of the estate." Wharton on Homicide (3 ed.), sec. 665. As observed by *Mr. Justice Field* in *Mutual Life Ins. Co. v. Armstrong,* 117 U. S., 591, 29 Law Ed., 997, "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken." Among the decisions in accord with this are *New York Life Ins. Co. v. Davis,* 44 L. R. A. (Va.), 305; *Supreme Eq. Life Assur. Society v. Weightman,* 66 L. R. A. (Okla.), 1210.

There is an exhaustive discussion of the question here presented in *Box v. Lanier,* 112 Tenn., 393. The material facts as therein stated were as follows: A husband obtained an insurance policy on his life in the sum of $10,000, which was payable to the wife of the assured should she survive; otherwise to his representatives. Immediately after its issuance he delivered the policy to his wife with the statement that it was her policy and that she must pay the premiums accruing on it. Out of her own estate all of the premiums were paid by her and the policy from the time it was delivered to her until her death was in her possession and under her control. Some time afterwards the husband feloniously took the life of his wife and then inflicted upon himself a mortal wound from the effect of which he died a few hours later.

The plaintiff insisted that the policy was a right existing in his intestate at the time of her death, and that while, under ordinary conditions, it would have vested in the husband surviving, *jure mariti,* yet, inasmuch as the survivorship was brought about by his felonious act, his estate should not be permitted to make profit out of it, and that the policy or its proceeds should be preserved to the representative of her estate for the benefit of her children who were her distributees. It was contended by the defendant that the husband by the terms of the policy had a fixed right in it, defeasible only upon the wife's surviving him, and, if not, the husband's right accrued to him *jure mariti,* and that this right should not be forfeited by the murder of his wife.

Sustaining the plaintiff's contention, the Court said: "It has been well said that there are certain general and fundamental maxims of the common law which control laws as well as contracts. Among these are: 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy, and have their foundation in universal law administered in all civilized countries.' These maxims embodied in the common law, and constituting an essential part of its warp and woof, are found announced both in text-books and in reported cases. Without their recognition and enforcement by the courts, their judgments would excite the indignation of all right-thinking people. The first of these maxims is applied in order to prevent one from taking the benefit of his own fraud. Why should not the last be enforced so as to forbid a party receiving the fruits of his own crime?"

And on the petition to rehear, it was further remarked: "We think that every legal and equitable consideration tend to support the claim of her administrator, and that, as a matter of right, as well as of sound public policy, the proceeds should pass to those of her blood who stood in closest relationship with her at the time of her death, to wit, her children, rather than to the representatives of one whose claim rests alone upon his felonious act."

Upon this broad principle it is held that a husband who murders his wife has no interest in her estate *jure mariti.* In *Perry v. Strawbridge,* 209 Mo., 621, 646, it was said that a provision that no conviction shall work a forfeiture of estate has no relation to the devolution of property; that it is intended to prevent forfeiture of a criminal's estate on account of his offense; that a surviving husband who had feloniously killed his wife acquired no estate in her property; and that there was nothing upon which the constitutional provision could operate. Distinction has been noted between the divesting of property and the denial of one's right to inherit—the rule generally approved being this: that public policy and the administration of justice prevent one from acquiring title to property which he seeks to obtain by murder. *Garwols v. Bankers Trust Co.*, 232 N. W. (Mich.), 239; *Shellenberger v. Ransom,* 28 A. S. R. (Neb.), 500; *Riggs v. Palmer,* 12 A. S. R. (N. Y.), 819; *Barnett v. Couey,* 27 S. W. (Mo.), 757; *Van Alstyne v. Taffy,* 169 N. Y. S., 173; *Bryant v. Bryant,* 193 N. C., 372. Nor is it necessary that there be an express exception in the policy forbidding a recovery by a beneficiary who intentionally kills the insured. *Metropolitan Life Ins. Co. v. Shane,* 135 S. W. (Ark.), 836.

It may be deduced from what we have said that the same principle of public policy which precludes the defendant from claiming the proceeds of the insurance as the administrator of the deceased husband directly under the contract of insurance, precludes him from claiming the proceeds on the ground that his intestate was a distributee of the deceased wife's estate. *Slocum v. Metropolitan Life Ins. Co.,* 245 Mass., 565; C. S., 10, 2522.

Since the defendant's intestate had no right to the insurance money under the contract or as distributee of his deceased wife's estate, Rebecca J. Groves, the mother of the assured, is precluded from claiming it solely for the reason that she is his next of kin. C. S., 137; *Wells v. Wells,* 158 N. C., 330; *In re Pruden,* 199 N. C., 256; *Schmidt v. Northern Iife Association,* 51 L. R. A. (Iowa), 141.

Does it therefore necessarily follow that Rebecca J. Groves is not entitled to the amount collected on the policy of the Woodmen of the World? The answer must be sought in the terms of the contract; for "the status of a beneficiary designated as such in an insurance policy or benefit certificate depends entirely upon the terms of the contract of insurance, construed in accordance with the rules of interpretation and construction applicable to such contracts, he being held chargeable with notice of the contents of the same." 2 Couch Cyc. of Ins. Law, sec. 306.

This proposition calls for a determination of the deceased wife's interest in the contract. Was it vested or contingent? If she had an unconditional vested right her status was such that the insured could not destroy her interest without her consent except as he could destroy his own right or interest by a forfeiture of the policy. *Conigland v. Smith,* 79 N. C., 303, modified in *Hooker v. Sugg,* 102 N. C., 115. In an ordinary policy of life insurance, the beneficiary acquires a vested interest from the time the insurance takes effect, if in the contract there is no stipulation reserving to the insured a right to change the beneficiary, assign the policy, or divert the proceeds, unless the language of the policy is inconsistent with a vested interest. *Herring v. Sutton,* 129 N. C., 107; *Lanier v. Ins. Co.,* 142 N. C., 14; *Wooten v. Order of Odd Fellows,* 176 N. C., 52; *Lockhart v. Ins. Co.,* 193 N. C., 8. This principle, however, does not prevail where the right or interest of a particular beneficiary is subject to be changed or to be defeated under the terms of the contract by which it was created. *Wooten v. Order, etc., supra; Pollock v. Household of Ruth,* 150 N. C., 211. If thus subject to be changed or defeated the interest of the beneficiary is not property but a mere expectancy, which cannot ripen into a vested interest before the death of the insured.

In the case before us Maggie F. Groves was the beneficiary. There was no change or attempted change by the insured. The succession of beneficiaries is definitely pointed out in the fifth section of the contract: "If there be no surviving wife or children, such benefits shall be paid to the next living relations of the member in the order named in the class of beneficiaries in paragraph four." There were no children. The interest of the wife was contingent upon her surviving her husband, and her death, occurring before his, terminated her contingent interest. 2 Couch, Cyc., etc., 999. The right to the proceeds of the policy thus passed to the next living relation of the insured, who is his mother. *Entwistle v. Traveler's Ins. Co.,* 51 At. (Penn.), 759; *Conn. Mut. Life Ins. Co. v. Burroughs,* 91 A. D. (Conn.), 725; *Germania Life Ins. Co. v. Wirtz,* 162 N. W. (Mich.), 981.

If it be granted that Rebecca J. Groves is in the class named in section four by reason of privity in blood with the insured, it does not follow that her status as beneficiary is not definitely fixed by the terms of the contract. Indeed, her interest is derived from the contract and is not affected by any asserted analogy between a devise and a contract of insurance. *Conigland v. Smith, supra.* The plaintiff, therefore, is not entitled to the proceeds of the policy issued by the Woodmen of the World.

We find no error in that part of the judgment which dismisses the plaintiff's second cause of action, based upon an alleged right to recover the value of his intestate's dower right, her year's support, and one-half the personal estate as distributee of the insured.

On the plaintiff's appeal the judgment is affirmed.

APPEAL BY DEFENDANT, F. L. POTTER, ADMINISTRATOR.

ADAMS, J. His Honor adjudged that the plaintiff is entitled to the money collected on the policy of the Mutual Life Insurance Company of Maine. The defendant excepted on the ground that the deceased husband was never convicted of the felonious slaying of his wife. True, the statute provides that if either husband or wife shall be convicted of the felonious slaying of the other, or of being accessory before the fact, the party so convicted shall thereby lose all his or her right . . . in the real or personal estate of the other party. C. S., 2522.

One of the admitted facts is this: the homicide committed by J. A. Groves was unlawful, wrongful, and felonious. A fact is a fact, whether determined by a jury or admitted by the parties. The defendant, having made the admission, has no reason to complain because his intestate was not technically convicted by a jury.

It will be noted, in addition, that Maggie F. Groves acquired a vested right by virtue of this policy, of which she could not be deprived without her consent. *Herring v. Sutton, supra; Lanier v. Ins. Co., supra; Wooten v. Order of Odd Fellows, supra; Lockhart v. Ins. Co., supra.*

On the defendant's appeal the judgment is affirmed.

T. G. HARTSFIELD v. HARVEY C. HINES COMPANY, A CORPORATION, AND HARVEY C. HINES, INDIVIDUALLY.

(Filed 18 February, 1931.)

1. **Libel and Slander B b—Privilege is a question of law to be determined by the court.**

   The question of whether slanderous words are privileged is a question of law for the court.

2. **Same—Where words are qualifiedly privileged the plaintiff must prove falsity and malice.**

   Where the slanderous words spoken of the plaintiff by the defendant are absolutely privileged, falsity and malice are irrebuttably negatived, but where the words are qualifiedly privileged the plaintiff must prove that they were falsely and maliciously uttered.

3. **Same—Words held to be qualifiedly privileged under the facts of this case.**

   Where the president of a corporation, after making investigation of reports of certain alleged misappropriations of its treasurer, summons him to his presence and inferentially charges him therewith in the presence of other officers or employees of the corporation having the duty of keeping the company's records, the accusations of the president are qualifiedly privileged, the president, officers and employees having an interest therein, and the treasurer in his action to recover damages for the utterance of the alleged slander must show that the words were spoken falsely and maliciously.

4. **Same—Evidence failed to show malice in utterance of words qualifiedly privileged and directed verdict would have been proper.**

In an action for slander uttered by the defendant as president of a corporation, inferentially charging its treasurer, the plaintiff, with misappropriating the company's property, evidence that the president and the plaintiff had always theretofore been on friendly terms, that the words were spoken in good faith and that the president appeared to be distressed at the time, is sufficient to support the finding of the court that the words spoken were spoken without malice.

5. **Same—Words spoken to police officer concerning misappropriations were qualifiedly privileged, the officer having an interest therein.**

Where a police officer has arrested an employee of a corporation having in his possession goods of the corporation that had been misappropriated, words spoken to the officer by the president of the corporation charging that another employee of the corporation had also misappropriated goods of the corporation are qualifiedly privileged, the president of the corporation and the officer having an interest in the matter, it being the duty of the officer to detect criminals.

6. **Same—In this case held: answer of defendant sufficiently pleaded qualified privilege.**

In an action to recover damages for slander justification and mitigation are comprehended in the defendant's answer alleging truth and privilege, especially when the facts from which the privilege springs are set up by the defendant and appear to be sufficient. C. S., 542.

CIVIL ACTION, before *Devin, J.*, at June Term, 1930, of LENOIR.

The plaintiff was employed by the individual defendant fourteen or fifteen years ago. Subsequently the business was incorporated and was thereafter known as the Harvey C. Hines Company. The plaintiff began work at $60 or $65 a month, and at the time of the utterance of the slanderous words, hereinafter complained of, he was making $4,200 per year. The plaintiff had general supervision of the entire business of defendant and was at the time the cause of action arose, treasurer of the defendant corporation and held a share of stock therein. The defendant corporation transacted a large volume of business and had many employees.

The evidence tended to show that the defendant Hines and the plaintiff were close friends and visited the homes of each other frequently, and each apparently had implicit confidence in the other. The defendant Harvey C. Hines was president of the corporation and in such capacity had general supervision and control of all the affairs of the company. Some time prior to 6 August, 1926, certain trusted employees made certain complaints and reports to Harvey C. Hines, president, with respect to certain transactions of plaintiff, which tended to leave the impression that the plaintiff was misappropriating the money of his employer. As a consequence of such reports, the defendant, Harvey C. Hines, undertook to make an investigation of the transactions of plaintiff, in the course of which investigation he examined the plaintiff's bank account and other business transactions, and as a result of inquiries so made, the defendant Hines, on the morning of 6 August, 1926, called the plaintiff into his private office. At the time there were also in the office Mr. Walters, Mr. Weise, and Mr. Small, who were all trusted employees of the corporation. Walters was vice-president of the company; Weise was head bookkeeper, and had charge of invoices and records, and Small was night clerk or the man in charge of the business during the night. These were the only persons in the private office of defendant Hines.

The conversation in the private office was narrated by the plaintiff as follows: I took a seat opposite Mr. Hines. He said: "Tom, I guess you know what I want to talk with you about?" I told him I did not. He said, "Well, we feel like you have not been dealing fair with us," and I said, "I don't understand any such accusation and I would like for you to explain," and he said, "I mean that you have simply been dishonest with us and I have made my investigation and am pretty well satisfied." I said, "You may be satisfied, but I would like to be satisfied. I would like for you to tell me what you are getting at." He said it did not need any explanation, and he said, "You don't deny these papers, do you?" He laid before me certain papers, and I told him those papers did not mean anything, and I asked him if he had anything besides that, and he said Mr. Small was his eye witness. I continuously asked him if he would not give me some definite reason for it. He said no, it did not need any explanation, and all he was going to ask of me was to resign, and he would not prosecute me, and that that was all that was necessary. I told Mr. Hines I would hand in my resignation, but first I would like for him to let me know just what his charges were, and if he would I would like to talk to him privately, and that instant we left the office and went out in the warehouse, etc.

The defendant offered testimony tending to show that the plaintiff did not deny misappropriating money, but confessed to the same. Employees of defendant testified that when the defendant returned from the warehouse where he and plaintiff had had a private conversation that the defendant Hines was shedding tears and was greatly distressed over what he considered the unfaithfulness of a trusted friend. The plaintiff, however, denied that he ever made any confession in private.

The defendant pleaded truth and justification. The defendant filed an itemized list of money and property which he claimed the plaintiff had appropriated to his own use. This list appears in the record as "Exhibit A" and consists of a certain sum of money in the compartment of the safe of the corporation used exclusively by the plaintiff. In addition to sums of money the said "Exhibit A" charged that the plaintiff had taken goods, wares and merchandise from the defendant's store for his own consumption, consisting of coca cola, coal, canned goods, and other items.

The plaintiff, as a witness in his own behalf, offered evidence tending to explain the items of money. Some of these items of money the plaintiff contended belonged to the Ku Klux and represented collections turned over to him from time to time by members of said order.

On 2 October, 1926, Asa C. Hawkins, a deputy sheriff of Lenoir County, arrested Mr. Small, an employee of defendant corporation, and one of those present on 6 August at the conference between the plaintiff and the defendant when the first alleged slanderous utterances were made by defendant Hines. Small was charged with illegal possession of whiskey. The evidence tended to show that on 2 August, 1926, at about 2 o'clock in the morning the defendant Hawkins called the defendant Hines over the telephone and informed him that he had arrested one of his employees. Thereupon Hawkins, in company with Mr. Wilcox, chief of police, went to the home of Mr. Hines. Hines came out on the porch in his bath robe and it was then between 1, 2 or 3 o'clock in the morning. Hawkins reported to Hines that he had one of his employees under arrest for violation of the law, and that he had found some of the property of the corporation down in the woods where the arrested employee was. The deputy sheriff testified that he "made a remark to him (Hines) that it was probably where some of his shortage came from. Hines replied, 'Tom (plaintiff Hartsfield) has been at that for two or three years.' " There was no evidence that Wilcox, the police officer, heard any of the conversation.

This conversation before daybreak at Hines' house on the second day of October, 1926, constitutes the second cause of action.

At the conclusion of the evidence the trial judge held as a matter of law that the conversation of 6 August, 1926, in the private office of defendant Hines was privileged and withdrew from the jury all consideration of the first cause of action based upon said conversation. In deference to such intimation of the court the plaintiff took a nonsuit as to the first cause of action and assigned the ruling of the judge as error.

Thereupon, the trial judge submitted the following issues to the jury:

1. Did the defendant, Harvey C. Hines, on or about 2 October, 1926, and in the presence of Asa Hawkins, speak of and concerning the plaintiff in substance the words alleged in the complaint?

2. If so, were they true?

3. What compensatory damages, if any, is the plaintiff entitled to recover therefor?

4. What punitive damages, if any, is the plaintiff entitled to recover therefor?

The jury answered the first issue "Yes"; the second issue "No"; the third issue "$10,325"; the fourth issue "$2,766.66."

The trial judge in his discretion set aside the verdict as to the fourth issue relating to punitive damages, and thereupon entered judgment that the plaintiff recover from the defendant, Harvey C. Hines, the sum of $10,325, with interest from 9 June, 1930, until paid. It was further ordered that the plaintiff recover nothing of the corporate defendant.

The plaintiff testified in reference to the relation between Hines and himself that up until 6 August, 1926, "I had always considered that my relations with Mr. Hines had not only been most pleasant, but had been cordial. I considered it so up until this very hour. He had shown me every consideration that I could expect from him. He had always treated me in a nice way. I felt like I had served him properly and he always respected me."

From judgment rendered both parties appealed.

George C. Green, McLean & Rodman, Whitaker & Allen and Rouse & Rouse for plaintiff.

Dawson & Jones, Sutton & Green, F. E. Wallace and Varser, Lawrence & McIntyre for defendant, Harvey C. Hines.

BROGDEN, J. The determinative questions of law presented by the record are:

1. Was the trial judge correct in holding that the conversation on 6 August, 1926, in the private office of defendant was privileged?

2. Was the conversation between the defendant and the deputy sheriff, Hawkins, on 2 October, 1926, privileged?

3. Must privilege be expressly pleaded where the defendant pleads truth and justification?

With reference to the first cause of action, based upon the conversation of 2 August, the judge charged the jury as follows:

"As to the first occasion, 6 August, 1926, the uncontradicted evidence is that the words were spoken by the defendant Harvey C. Hines as president of the Harvey C. Hines Company and were spoken to the plaintiff, who at that time was an officer and employee of that company, and were spoken in the presence of other employees of the company in respect to a matter as to which each of them had an interest, and, therefore, the communication was a qualifiedly privileged one and no action for damages would lie, therefore, unless the words were spoken with actual or express malice, in the sense of ill will, grudge, revenge or desire to injure, and as to the utterance of 6 August, 1926, there is not sufficient evidence to be submitted to you that Harvey C. Hines was at that time and on that occasion and under those circumstances actuated by express malice, and the court having at the close of the testimony so announced these views as to the law, and that it would so charge the jury, the plaintiff in deference to such intimation of the court, took a nonsuit as to the cause of action based on the alleged slander on 6 August, 1926, and, therefore, that part of the case is removed from your consideration and issues are submitted to you now only as to the utterance alleged to have been made by the defendant, Harvey C. Hines, to Asa Hawkins on 2 October, 1926."

The foregoing instruction is in accord with authority established by the decisions of this Court. *Ramsey v. Cheek,* 109 N. C., 270; *Gattis v. Kilgo,* 128 N. C., 402; *Gattis v. Kilgo,* 140 N. C., 106; *Fields v. Bynum,* 156 N. C., 413; *Beck v. Bank,* 161 N. C., 201; *Brown v. Lumber Co.,* 167 N. C., 9; *Elmore v. R. R.,* 189 N. C., 658; *Tripp v. Tobacco Co.,* 193 N. C., 614; *Ferrell v. Siegle,* 195 N. C., 102; *Newberry v. Willis,* 195 N. C., 302.

Privilege is a question of law and is to be determined by the court. The idea was expressed in *Gattis v. Kilgo,* 140 N. C., 106, as follows: "The standard of privilege is the standard of the law, not of the individual, and the privilege depends, not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as matter of law, his interest or duty to have been. The court determines what is and what is not privileged."

The legal distinctions between absolute and qualified privilege are pointed out in the decisions. Qualified privilege rests upon the fact of interest or duty. That is to say, if the speaker of the alleged slanderous words has an interest or duty in the subject-matter of the conversation, and the hearer has an interest or duty with respect to the subject-matter of the conversation, then the doctrine of qualified privilege applies. "If the words are actionable *per se* in 'unprivileged' slander and libel, falsity and malice are prima facie presumed. If 'absolutely privileged,' falsity and malice are irrebuttably negatived, and if it is a case of 'qualified privilege,' falsity and malice must be proven." *Newberry v. Willis,* 195 N. C., 302.

Applying the law to the conversation of 6 August, 1926, in the private office of the defendant, it is clear that all parties present had an interest in the subject-matter of the conversation. The subject-matter of the conversation disclosed by the evidence was certain irregularities in handling the cash, invoices and other records of the business. The plaintiff had an interest in these transactions because he was the treasurer of the company and charged with the duty of preserving the property and records of his employer. Walters, who was present, had an interest in the subject-matter of the conversation because he was vice-president of the company. Weise had an interest because he was head bookkeeper and charged with the duty of preserving the records and property of his employer. Small had an interest because he was in charge of the business at night, and it was likewise his duty to preserve and properly account for invoices and property of his employer coming into his hands. Certainly the defendant Hines, as president of the corporation and as the active head of its transactions, had an interest in the subject-matter of the conversation and was in like manner charged with the duty of preserving the property and records of the corporation. Moreover, there was no evidence of such malice as the law recognizes as sufficient to overthrow the qualified privilege of the occasion because the plaintiff testified that the relations between him and the defendant had been close, friendly and cordial up to the very moment of the conference.

Therefore, we hold that the trial judge ruled properly in excluding the first cause of action from consideration by the jury.

The second cause of action involves the conversation between the defendant and a deputy sheriff. The evidence discloses that the conversation took place before daybreak at the defendant's home, and that he was presumably called from his bed by the officer and apprised of the fact that a trusted employee, to wit, one Small, was under arrest, and that certain property of the defendant corporation had been found in the woods where Small had been. The conversation between the deputy sheriff and the defendant is not clearly expressed in the evidence, but the unmistakable inference from the words used compel the conclusion that the officer intended to suggest to the defendant that Small was the party responsible for the shortage in the business. Small was one of the persons present at the conference between the plaintiff and the defendant on 6 August, and was at the time of the officer's visit a trusted employee of the defendant corporation and in charge of its property and records during the night time. The bald intimation made to the defendant by the officer was that Small and not the plaintiff was guilty of misappropriation, if such had occurred.

In this situation, what was the defendant to do? Should he stand mute or should he reply to the accusation thus made? He chose to speak the words set out in the record. It is to be assumed that the officer approached the defendant in the dead hours of the night in good faith, and for the sole purpose of bringing the wrongdoer, whoever he was, to account. He was employed by the State for that exclusive purpose. Thus the officer had an interest in the occasion. The defendant likewise had an interest in the subject-matter of the conversation and was charged with a duty with reference to the accusation made by the officer.

The courts and textwriters have discussed the question as to whether a communication to such officers, made in good faith and without malice, is justified under the doctrine of qualified or absolute privilege. See *Stevens v. Allen,* 15 A. L. R., 245; *Shinglemeyer v. Wright,* 124 Mich., 230, 50 L. R. A., 129; *Parker v. Kilpatrick,* 126 Atlantic, 825. In the *Parker case, supra,* the Supreme Court of Maine holds that words spoken to a police officer, peace officer, or deputy sheriff, either for the detection of crime or for the protection of his own property, if made in good faith and without malice, are privileged. To like effect are the words quoted in the case of *Logan v. Hodges,* 146 N. C., 38, as follows: "Words charging a party with theft, spoken in good faith, under a belief of their truth and with probable cause, to a police officer employed to detect the robber, are in the nature of a privileged communication." As all police officers and sheriffs are employed by the State to detect crime, it is not apprehended that they should be specifically employed by a particular individual in order to permit him to claim the protection of qualified privilege.

Applying the accepted principles of law to the facts disclosed, we are of the opinion and so hold, that the conversation of 2 October, 1926, was subject to the defense of qualified privilege, and, therefore, we deem the ruling of the trial judge to the contrary, as erroneous.

The third question of law involves the question as to whether privilege must be specifically pleaded. C. S., 542, expressly provides that a plea of justification and mitigating circumstances may be set up in the answer as a defense to an action for slander. Apparently the statute contemplated that privilege was a form of justification. Certainly in the forum of reason justification is a general term broad enough to cover both truth and privilege. At any rate the facts from which the privilege springs are set forth in the answer. The plaintiff relies upon *Gudger v. Penland,* 108 N. C., 593, but an examination of that decision discloses that the court had in mind the allegations of the complaint rather than defenses required to be set up in the answer, and we do not deem this case decisive of the question.

Questions of the admissibility of evidence and exceptions to the charge of the court have been debated in the briefs, but as a new trial must be awarded for the reason hereinbefore set out, we do not discuss or decide the points of law raised by said exceptions.

Plaintiff's appeal: No error.

Defendant's appeal: New trial.

THE CITY OF WASHINGTON AND THE TRUST COMPANY OF WASHINGTON, AS SINKING FUND COMMISSION OF THE CITY OF WASHINGTON, v. M. U. HODGES, DR. E. M. BROWN AND MRS. LENA SWAIN.

(Filed 18 February, 1931.)

1. **Appeal and Error J b—Refusal of trial court to allow defendant to file answer after time is not reviewable on appeal.**

   The refusal of the trial court to allow a defendant to file answer after the time is not reviewable on appeal, the matter being within the sound discretion of the trial court.

2. **Pleadings H a—Trial court has the power in his discretion to allow extension of time for filing pleadings.**

   N. C. Code, 1927, 509, providing that the clerk may not extend the time to file answer for more than twenty days from the time the answer is due to have been filed, except by consent of parties, does not affect the right of the Superior Court judge to allow an extension of time under C. S., 536, in his discretion upon such terms as he may deem just, but the matter is within his discretion, and no appeal will lie from his refusal to allow a defendant to file answer after the trial is called.

3. **Same — Where answer of codefendant does not set up cross-action against complainant he is not entitled to be served with answer.**

   Where one defendant has, with the consent of the plaintiff been allowed an extension of time to file answer and has interposed a defense involving the rights of his codefendant, the latter who has filed no answer is bound by the discretionary ruling of the judge refusing to allow him to file answer upon his discovery of the matter alleged in the answer of his codefendant which was not served on him, such answer not setting up a cross-action by the defendant filing it against the complaining defendant.

APPEAL by defendant, E. M. Brown, from *Harris, J.*, at October Term, 1930, of BEAUFORT. Affirmed.

Facts: (1) On 21 December, 1923, the defendant, M. U. Hodges executed and delivered to the defendant, Mrs. Lena Swain, seven notes of $500 each, due annually for seven years, interest at the rate of six per cent payable annually, aggregating $3,500. Said notes were secured by deed of trust to Harry McMullan, which was duly recorded. A provision in the deed of trust was to the effect that upon default in the payment of any note and interest the whole indebtedness was to become due and payable.

(2) That said notes were endorsed as follows: (a) Mrs. Lena Swain to Dr. E. M. Brown (Dr. Brown having sold Mrs. Swain a tract of land and this was in payment). (b) Dr. E. M. Brown endorsed said notes for a valuable consideration to the Trust Company of Washington as Sinking Fund Commissioner of the City of Washington, and the

plaintiff is now the owner and holder of the notes. M. U. Hodges, who executed to Mrs. Lena Swain the seven notes of $500 each, as above set forth, which represented the balance owing on the purchase of land, and on said land there was a mortgage showing canceled upon the records, which afterwards in the suit of *Union Central Life Ins. Co. v. Ada G. Cates,* the said M. U. Hodges and others (reported 193 N. C., 456), was declared in full force and effect.

(3) The land was sold by a commissioner appointed to foreclose the encumbrance in the *Union Central Life Ins. Co. case, supra,* and after paying the liens on the property there was a balance of $552.22.

(4) On 11 November, 1927, an action was brought by plaintiff against the defendant M. U. Hodges, Dr. E. M. Brown and Mrs. Lena Swain, and the complaint filed 12 November, 1927, alleges, among other things: "(3) That said notes bear upon the back thereof the endorsement of the defendants, Mrs. Lena Swain and Dr. E. M. Brown, and the plaintiff, the Trust Company of Washington, is the holder thereof in due course, having paid full value therefor and before maturity. . . . That there is now due the plaintiffs upon said notes the full amount of $3,000, with interest from 21 December, 1924, subject, however, to the payment of $552.22, if said amount is properly payable upon said notes, which as plaintiffs are informed and believe is true."

M. U. Hodges, answering, says: "That on or about 21 December, 1923, this defendant executed to Mrs. Lena Swain seven notes of $500 each, one being due each year for seven successive years, which notes were secured by deed of trust to Harry McMullan; that said notes represented and were given for $3,500 of the purchase money of a tract of land conveyed by Mrs. Lena Swain and her husband to this defendant, being the same land described in the deed of trust executed by him to Harry McMullan, which notes and deed of trust were executed and delivered by this defendant on the representation and warranty of Mrs. Lena Swain and her husband to him that said land was free and clear of all encumbrances and that they were conveying to him a good and indefeasible title, upon which he relied, and without which he would not have made said purchase. It is also admitted that only the first of said notes and interest on all of them for one year has been paid and this payment was made before defendant learned of the true situation in respect to said land. . . . This defendant has no knowledge or information sufficient to enable him to form a belief as to the matters alleged in section 3, and therefore denies the same and particularly denies that said Trust Company of Washington is a holder of said notes in due course or that it paid full value therefor, but, on the contrary, took said notes and holds the same with actual or constructive notice of their infirmity and of all the facts, as this defendant is informed and believes, . . . which sale was made under foreclosure of a prior outstanding mortgage or deed of trust in favor of said Union Central Life Insurance Company, which appeared to have been canceled of record and which this defendant was informed by Mrs. Lena Swain and husband, or their attorney, had in fact been paid and canceled; relying upon which and being ignorant to the contrary, this defendant executed the purchase-money notes and the deed of trust aforesaid and undertook thereafter to maintain his right and title to said land as free and clear of encumbrances."

For further answer he alleges: "That he purchased said land from Mrs. Lena Swain and husband for the sum of $4,500, and paid thereon $1,000 in cash, executing seven purchase-money notes and deed of trust for the balance of $3,500, as aforesaid, and upon the representation and warranty of title made to him that the property was free and clear of all liens and encumbrances, upon which he relied; that thereafter it was judicially established in the suit of *Union Central Life Insurance Company et al. v. Ada G. Cates et al.,* that the mortgage or deed of trust in favor of said Life Insurance Company was a valid and subsisting lien on the property and a foreclosure sale thereof was ordered and made, and in consequence of which the property was sold and this defendant thereby wholly deprived of his right and title thereto; that in consequence thereof, he is entitled to recover of Mrs. Lena Swain and her husband the sum of $1,000 and $500 paid on the first note and to have all of said notes surrendered up and canceled, as he is advised and believes. That the plaintiffs, together with Dr. E. M. Brown, had actual or constructive notice of all the facts and circumstances and are not innocent holders or purchasers of said notes, or any of them, as this defendant is informed and believes."

The answer was filed 30 December, 1927. Mrs. Lena Swain and Dr. E. M. Brown filed no answer. The case came on for trial at October Term, 1930.

The issue submitted to the jury and their answer thereto was as follows: "Did the plaintiff, sinking fund commissioner, acquire the notes sued on as a holder in due course? Answer: No."

The following judgment was rendered by the court below:

"This cause coming on to be heard before his Honor, W. C. Harris, judge presiding, and a jury sworn and empaneled, and the jury having found in response to the issue submitted that the plaintiff, the Trust Company of Washington as Sinking Fund Commissioner, was not an innocent purchaser, or holder in due course of the notes described in the complaint, which were acquired by it from the defendant, E. M. Brown, and it further appearing that the defendants Brown and Lena Swain have not answered the complaint nor filed any reply to the cause of action alleged against them in the answer of defendant Hodges:

It is now on motion of H. C. Carter, Esq., attorney for plaintiffs, adjudged and decreed by the court that the Trust Company of Washington, as Sinking Fund Commissioner, recover of said defendants, E. M. Brown, and Lena Swain, the sum of said notes, to wit, $3,000, with interest thereon from 21 December, 1924, together with the costs of this action to be taxed by the clerk.

On motion of McLean & Rodman, attorneys for defendant, M. U. Hodges, it is adjudged and decreed by the court that as against him plaintiffs take nothing by their suit and that he recover of plaintiffs his costs expended to be taxed by the clerk; further, that as to the defendants, E. M. Brown and Lena Swain, the allegations of the answer of said M. U. Hodges be taken as admitted, and that neither the plaintiffs nor the said Brown and Swain is entitled to recover anything on said notes or any of them from the defendant Hodges."

The assignment of error and other facts will be set forth in the opinion.

H. C. Carter for plaintiff.
MacLean & Rodman for M. U. Hodges.
Ward & Grimes for Dr. E. M. Brown.

CLARKSON, J. This is an action brought by plaintiff against the defendants to recover $3,000 (six notes $500 each), with interest from 21 December, 1924, subject to a credit of $552.22 surplus from a sale under a prior mortgage wrongfully canceled of record. See *Insurance Co. v. Cates,* 193 N. C., 456. There were seven notes of $500 each, due annually for seven years, given by M. U. Hodges to defendant, Mrs. Lena Swain, balance purchase money on land, secured by deed of trust which was duly recorded. These notes for value were endorsed by Mrs. Lena Swain to Dr. E. M. Brown in a land purchase, and Dr. Brown for value endorsed same to plaintiff. One of the $500 notes has been paid by M. U. Hodges. This suit was instituted on 11 November, 1927, and complaint filed on 12 November, 1927, and served on defendants and on Dr. E. M. Brown 15 November, 1927. Neither Mrs. Lena Swain nor Dr. E. M. Brown filed an answer. Defendant M. U. Hodges filed an answer on 30 December, 1927, alleging false representations on the part of Mrs. Lena Swain to the effect that she represented that the land was free and clear of encumbrance when there was a prior mortgage as set forth in *Insurance Co. v. Cates, supra.* That the plaintiff was not a holder in due course, but took the notes and held the same with notice of their infirmity. C. S., 3033, 3037. The issue was submitted to the jury at October Term, 1930: "Did the plaintiff, Sinking Fund Commissioner, acquire the notes sued on as a holder in due course?" The jury answered "No." As between plaintiff and Hodges, the finding of the jury settled their controversy.

But Dr. E. M. Brown contends that the question involved in this appeal: "Can the defendant (Hodges) by consent of plaintiff's counsel, but without order of clerk or judge, procure an extension of time to file his answer, setting up in his answer, filed after the statutory time, matters affecting the rights of his codefendant Brown, without giving him notice of the contents of the answer on the grounds that Brown—in recognition of the plaintiff's rights as set out in the complaint—has filed no answer to the complaint, thereby precluding Brown from setting up his rights against the codefendant Hodges?"

On this record we cannot agree with the contentions made by Dr. Brown. He was served with summons and complaint on 15 November, 1927, and made no answer. Defendant M. U. Hodges filed his answer 30 December, 1927. M. U. Hodges executed to Mrs. Lena Swain the seven notes of $500 each secured by deed of trust to Harry McMullan, trustee, as above set forth, the said notes represented the balance owing on the purchase of land from Mrs. Lena Swain. It is alleged by him that Mrs. Lena Swain fraudulently represented to him that the land was free and clear of any encumbrance, while in fact there was a mortgage showing canceled upon the records, which afterwards in the suit of *Union Central Life Insurance Company v. Ada G. Cates,* the said M. U. Hodges and others (reported 193 N. C., 456), was declared in full force and effect.

It appears in the record, and it is not denied by Dr. Brown, that on the issue above set forth he was a witness for plaintiff and undertook to establish the fact that he (Brown) was an innocent holder or purchaser of the notes. This question was directly submitted to the jury under the charge of the court, and the jury found that Brown was not a holder in due course or innocent purchaser. We think he has no cause to complain. *Rand v. Gillette,* 199 N. C., 462.

The court below refused to allow Dr. Brown to file answer and found as a fact "that the neglect of E. M. Brown to employ counsel and file answer was inexcusable."

Dr. Brown contends that N. C. Code, 1927 (Michie), 509, was not followed, in that the court below did not allow an extension of time to Hodges to file an answer, but the plaintiff did and thereby Dr. Brown's rights were affected as the answer of Hodges accomplished this result and he was given no notice of the contents of the answer.

The above statute says in part, "The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days *except by consent of parties.*" (Italics ours.) See *Battle v. Mercer,* 187 N. C., at p. 448.

In the present case the plaintiff consented to an extension of time for Hodges to answer. As between the plaintiff and Hodges, section 509, *supra,* was strictly complied with. Dr. Brown was served with summons and complaint on 15 November, 1927, and the trial was at October Term, 1930. Dr. Brown filed no answer and the case was pending nearly three years. Dr. Brown when served with summons and complaint should have answered and set up what rights, if any, he had against plaintiff, and if secondarily liable to Hodges should have asserted that right, just as M. U. Hodges asserted his rights when summons and complaint of plaintiff were served on him.

The record discloses that the case was regularly calendared for trial at the October Term, 1928, but continued. The case was again set for trial at May Term, 1929, October Term, 1929, February Term, 1930, May Term, 1930, and October Term, 1930, at which time it was finally tried. The defendant Brown had not answered at the time of the trial and judgment by default final was duly entered against him and the other defendant, Mrs. Lena Swain, who likewise had filed no answer.

The answer of Hodges asserts no affirmative cause of action against Dr. Brown; it contains merely matters of defense as against plaintiff. The affidavit of Dr. Brown, in part, is as follows:

"That this defendant was well acquainted with H. M. Burrows, who was manager and treasurer of the Trust Company of Washington and that after the summons and complaint were served on him he talked with the said Burrows about the matter, and the said Burrows told this defendant that the liability of him, Brown, was secondary to the liability of Hodges, the maker of the said notes, and to the liability of Lena Swain, the first endorser thereon, and this affiant recognizing his liability as endorser on the said notes subject to the prior liabilities of the said Hodges, and the said Swain employed no attorney and filed no answer therein.

"That this suit was called for trial at October Term, 1930, and this defendant was present in court and heard the pleadings read and heard the answer of M. U. Hodges read, section 7 of which is as follows: 'That the plaintiffs, together with Dr. E. M. Brown, had actual and constructive notice of all the facts and circumstances and are not innocent holders or purchasers of said notes or any of them, as this defendant is informed and believes.' . . . That no copy of said answer of M. U. Hodges has ever been delivered to this defendant, and he had no knowledge of the contents of said answer until same was read as aforesaid at this term of court. . . . Wherefore, he prays the court to allow him to file answer, setting up his defense to the cross-action of the defendant Hodges, and offered evidence in support of his contentions."

This request of Dr. Brown was *to file answer.* C. S., 600, is only applicable to set aside a judgment, etc., for mistake, surprise, excusable neglect. The statute has no bearing on the facts here. See *Foster v. Allison Corp.,* 191 N. C., 166.

The court below refused to allow Dr. Brown to file answer. We think this was in the sound discretion of the court below, and ordinarily not reviewable.

We have set forth the pleadings and facts at length to show there was no abuse of discretion or arbitrary action on the part of the court below, although this was not necessary.

C. S., 536, is as follows: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time."

C. S., 637: "Whenever a civil action or special proceeding begun before the clerk of the Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

"It is too well settled to require or even justify discussion, that the enlargement of the time for filing pleadings is a matter to be decided according to the court's discretion. *Wilmington v. McDonald,* 133 N. C., 548." *Church v. Church,* 158 N. C., at p. 566; *Horney v. Mills,* 189 N. C., 729. This discretion is ordinarily not reviewable.

In *McNair v. Yarboro,* 186 N. C., at p. 113, it is stated: "And we consider it well to state further that, while this chapter 92, in section 3, provides that 'where copy of the complaint has been served upon each of the defendants, the clerk shall not extend the time for filing answer beyond twenty days after such service.' This restriction applies to the clerk, and does not and is not intended to impair the broad powers conferred on the judge in this respect by section 536 of Consolidated Statutes, to the effect that where the cause is properly before him, 'he may, in his discretion and upon such terms as may be just, allow an answer or reply to be made or other act done after the time or by an order to enlarge the time.'" *Cahoon v. Everton,* 187 N. C., 369; *Roberts v. Merritt,* 189 N. C., 194; *Howard v. Hinson,* 191 N. C., 366; *Greenville v. Munford,* 191 N. C., 373; *Burton v. Smith,* 191 N. C., 599; *Butler v.*

Armour, 192 N. C., 510; *Aldridge v. Ins. Co.,* 194 N. C., at p. 685; *Dunn v. Jones,* 195 N. C., 354; *Light Co. v. Reeves,* 198 N. C., at p. 409.

The request of Dr. Brown to file answer was in the discretion of the court below, which is not reviewable on the facts of this record. The learned attorneys for Dr. Brown can cite us to no authority, and we can find none, to sustain their contentions. The judgment below is

Affirmed.

FIRST NATIONAL BANK OF WAYNESVILLE, N. C., ET AL. v. WAYNESVILLE FURNITURE COMPANY ET AL. AND CITIZENS BANK AND TRUST COMPANY OF WAYNESVILLE, N. C., ET AL. v. HAYWOOD FURNITURE COMPANY ET AL.

(Filed 18 February, 1931.)

1. **Fraudulent Conveyances A e—Transfer of bulk of corporate property to another corporation is not binding on creditors not agreeing thereto.**

   A deed of an insolvent corporation of practically all its assets to another corporation, formed to take over its business, under an agreement that the purchasing corporation should satisfy the creditors of the selling corporation by issuing shares of stock or paying a percentage of their claims, is not binding on creditors of the selling corporation who did not agree thereto and who refuse to settle upon such basis, and who have not waived their rights, and they may have the deed to the purchasing corporation set aside.

2. **Corporations I d—Creditors of insolvent corporations selling its assets to another held to have priority in assets transferred.**

   Where two insolvent corporations have conveyed by deeds their entire assets to a corporation formed for the purpose of merging them, and which continued to operate the property thus acquired, incurring further indebtedness, and subsequently placed in the hands of a receiver by order of court, the creditors of each of the selling corporations are entitled to a priority over the creditors of the merged corporation out of the assets derived from their debtor corporation respectively when they have not by their actions or conduct waived their right.

3. **Trial F a—Where there is no evidence to support issue tendered refusal to submit the issue is not error.**

   A new trial for the refusal of the trial judge to submit an issue raised by the pleadings will be granted only where there is evidence tending to support the issue.

APPEALS by defendants from *Finley, J.,* at May Term, 1930, of HAYWOOD, and at August Special Term, 1930, *Cowper, Special Judge.* No error in either appeal.

The above-entitled actions were begun in the Superior Court of Haywood County, by plaintiffs, creditors of the defendant, Waynesville Furniture Company, and of the defendant, Haywood Furniture Company, respectively, to recover of said defendant in each of said actions the amount of their several claims; and also to recover judgment in each of said actions that a certain deed dated 28 June, 1928, and executed by the said defendant therein conveying all its property, real and personal, to the defendant, Robbins Furniture Company, is null and void, and that the defendant, C. W. Perry, receiver of the Robbins Furniture Company, be enjoined and restrained from paying out certain moneys in his hands as such receiver, the proceeds of sales made by him of part of said property, during the pendency of said actions.

The facts alleged in the complaints in both said actions, as constituting the cause of action on which plaintiffs in each of said actions demand judgment against the defendants therein, are practically identical. Defendants in their answer to the complaint in each action deny certain allegations therein, and allege matters in defense of plaintiffs' right to recover on the allegations of the complaint. There was evidence at the trial of each of said actions tending to establish the allegations of the complaint which are denied in the answer.

The facts admitted in the pleadings and shown by all the evidence at the trial of both actions, are substantially as follows:

The Waynesville Furniture Company and the Haywood Furniture Company are corporations duly organized under the laws of this State, and as such corporations were engaged in the business of manufacturing furniture in or near the city of Waynesville, in Haywood County, North Carolina, prior to 28 June, 1928. Both corporations had become and were on said day wholly insolvent. Each was indebted in an amount largely in excess of the value of its assets.

As the result of negotiations by and between said corporations and one R. C. Robbins, each of said corporations on 28 June, 1928, executed a deed by which it conveyed practically all its property, real and personal, to the Robbins Furniture Company, a corporation created under the laws of this State for the purpose of taking title to and possession of said property under said deeds. At the date of said deeds, no part of the capital stock of said Robbins Furniture Company had been issued, nor had the subscribers for said capital stock paid in any part thereof, in money or otherwise. The consideration recited in each of said deeds is, "Ten dollars, and other valuable considerations." The value of the property conveyed by both of said deeds was not less than three hundred thousand ($300,000) dollars. Neither the Waynesville Furniture Company nor the Haywood Furniture Company retained property sufficient and available for the payment of its debts; nor did either of said corporations receive from the Robbins Furniture Company any consideration for the conveyance of its property by its deed. It was agreed, however, prior to and at the date of the delivery of said deeds, by and between the Waynesville Furniture Company, the Haywood Furniture Company, and the Robbins Furniture Company, that the said Robbins Furniture Company should satisfy all the creditors of the said Waynesville Furniture Company and of the said Haywood Furniture Company, by the payment of a certain percentage of their claims in money or by the issuance to said creditors of its stock for the full amount of their claims, at the option of said creditors. Prior to the date of the delivery of said deeds, many of the creditors of the Waynesville Furniture Company and of the Haywood Furniture Company had accepted settlements of their claims by the Robbins Furniture Company. Pursuant to the terms of said settlements, creditors of both said corporations who had agreed to accept stock of the Robbins Furniture Company in settlement of their claims, met in the city of Waynesville, N. C., on 8 September, 1928, and as stockholders thereof organized the Robbins Furniture Company. Certificates of stock were issued by the Robbins Furniture Company to creditors of said corporations who had agreed to accept stock in settlement of their claims. Neither of the plaintiffs in the above-entitled actions was present at the meeting held on 8 September, 1928; nor had either of said plaintiffs agreed to accept a settlement by the Robbins Furniture Company of his or its claim, in accordance with the agreement by and between the said company and the Waynesville Furniture Company and the Haywood Furniture Company.

The Robbins Furniture Company took into its possession all the property conveyed to it by the Waynesville Furniture Company and by the Haywood Furniture Company by the deeds dated 28 June, 1928, and operated the factories located on the lands described in said deeds from 8 September, 1928, to 23 August, 1929. During the time of such operation the Robbins Furniture Company contracted debts to various persons, firms and corporations in large amounts, which it has failed to pay. On 23 August, 1929, the said Robbins Furniture Company was duly adjudged insolvent, and the defendant, C. W. Perry, was appointed as its receiver. At the date of the commencement of the above-entitled actions, the said defendant, C. W. Perry, receiver of the Robbins Furniture Company, had in his possession as such receiver all the property which had been conveyed to the said Robbins Furniture Company by the deeds dated 28 June, 1928, except such parts of said property as he had sold under orders of the Superior Court of Haywood County. He had in his possession certain moneys, the proceeds of the sale of said property, and also moneys which he had collected on accounts due the Robbins Furniture Company, at the date of his appointment as its receiver.

On 28 June, 1928, the plaintiffs in the above-entitled actions were creditors of the Waynesville Furniture Company and of the Haywood Furniture Company, respectively, in the amounts alleged in the complaints in said actions. No payment has been made on the claim of either of the plaintiffs by the Waynesville Furniture Company or the Haywood Furniture Company, or by the Robbins Furniture Company. In their answer to the complaint in each of the above-entitled actions, defendants allege that plaintiffs therein ratified the conveyance of the property described in the deeds dated 28 June, 1928, and are estopped by their conduct from asserting now that said deeds are null and void as against them.

In the action entitled "Citizens Bank & Trust Company *et al. v.* Haywood Furniture Company *et al.*," tried at May Term, 1930, of the Superior Court of Haywood County before Finley, J., and a jury, in response to the fourth issue, the jury found that plaintiffs in said action did not ratify the conveyance of its property to the Robbins Furniture Company by the Haywood Furniture Company by its deed dated 28 June, 1928, as contended by the defendants in said action. The court refused to submit an issue tendered by defendants involving the allegations in the answer that plaintiffs are estopped by their conduct from asserting that said deed is null and void. To such refusal, defendants duly excepted.

In the action entitled "First National Bank *et al. v.* Waynesville Furniture Company *et al.*," tried at August Special Term, 1930, of the Superior Court of Haywood County, before Cowper, special judge, and a jury, in response to the third and fourth issues, the jury found that plaintiffs in said action are not estopped by their conduct from asserting that the deed dated 28 June, 1928, executed by the Waynesville Furniture Company to the Robbins Furniture Company, is null and void, and that said plaintiffs did not ratify the conveyance of its property to the said Robbins Furniture Company by the Waynesville Furniture Company by said deed, as contended by the defendants in said action. Defendants duly excepted to certain instructions of the court to the jury with respect to the third and fourth issues.

At the trial of each of the above-entitled actions all the issues submitted by the court to the jury were answered in accordance with the contentions of the plaintiffs, and against the contentions of the defendants.

On the verdict at the trial of each of the above-entitled actions, it was ordered, adjudged and decreed that the plaintiffs therein recover of the defendant, Waynesville Furniture Company and of the defendant, Haywood Furniture Company, respectively, the amount of their several claims; that the deed executed by each of said defendants dated 28

June, 1928, conveying its property described therein to the defendant, Robbins Furniture Company, is null and void, and that said deed be canceled on the record, and that the defendant, C. W. Perry, receiver of the Robbins Furniture Company, turn over and deliver to each of said defendants all the property now in his possession, which was conveyed to the Robbins Furniture Company by said defendant, and account to the receiver of each of said defendants for all moneys in his hands derived from the sale by him of any part of said property. It was further ordered, adjudged and decreed that plaintiffs in each of the above-entitled actions have a first lien on all the assets of the defendant therein, recovered by said action.

From the judgment in each of the above-entitled actions, the defendants therein appealed to the Supreme Court.

Hannah & Hannah, John M. Queen, Edwards & Leatherwood and G. L. Jones for plaintiffs.

Thomas J. Gold, A. Hall Johnston, W. G. Hall and Alley & Alley for defendants.

CONNOR, J. The appeals by the defendants in the above-entitled actions, when called for hearing in this Court, were consolidated by consent, both for argument by counsel, and for consideration by the Court. Accordingly, the two appeals were argued and have been considered as if there were only one appeal by defendants from a judgment of the Superior Court of Haywood County, in favor of the plaintiffs and against the defendants. The questions involved in both appeals are practically the same. Assignments of error in one appeal which do not appear in the other are not vital, and even if sustained would not entitle defendants to a reversal of the judgment or to a new trial.

Defendants' contention presented by their exception to the refusal of the trial court to sustain their demurrer *ore tenus* to the complaint in one of said actions, for that the facts stated therein do not constitute a cause of action, cannot be sustained. The facts alleged in the complaint in each action are sufficient to constitute a cause of action. It is well settled that a corporation cannot sell or in any way alien its property to the prejudice of its creditors, so as to hinder, delay or defraud them in the collection of debts owing by the corporation; and in general, whenever a conveyance is made by a corporation under such circumstances as would characterize it as a fraud upon creditors if made by an individual, it will be set aside in equity, at the suit of such creditors, or other appropriate relief will be accorded them. On this principle, it has been held that a sale by a corporation to another corporation, in consideration of the latter delivering a specified amount of its stock to the individual shareholders of the selling corporation, and guaranteeing the payment of the debts of the selling corporation, is prima facie fraudulent as to creditors of the selling corporation. *McIver v. Hardware Co.,* 144 N. C., 478, 57 S. E., 169. This principle is applicable in the instant cases where it is alleged in the complaints and shown by all the evidence at the trial of both actions that the conveyances were made upon the agreement by the Robbins Furniture Company to issue its stock to the creditors of the Waynesville Furniture Company and of the Haywood Furniture Company, respectively, who should accept said stock in settlement of their claims. The conveyances by the deeds dated 28 June, 1928, were null and void as to such creditors who did not consent thereto, who did not subsequently ratify the same or who are not estopped by their conduct from asserting that said conveyances are void as to them.

It is not contended by the defendants in the above-entitled actions that the plaintiffs therein, who were creditors of the Waynesville Furniture Company and of the Haywood Furniture Company, respectively, at the date of the conveyances, consented to said conveyances. The jury found at the trial of both actions that plaintiffs did not ratify the conveyances. In the action entitled, "First National Bank *et al. v.* Waynesville Furniture Company *et al,*" the jury further found that plaintiffs in said action were not estopped by their conduct after the conveyance from asserting their claims against the defendants. The defendants contend that there was error in the trial of the action entitled, "Citizens Bank & Trust Co. *et al. v.* Haywood Furniture Company *et al,*" in that the court refused to submit the issue tendered by defendants, involving their contention that plaintiffs in said action are estopped by their conduct from maintaining said action. After a careful consideration of all the evidence offered by defendants at said trial, we are of the opinion that there was no evidence from which the jury could have answered this issue in the affirmative. There was no evidence tending to show that plaintiffs in said action made any representations prior to and at the date of the delivery of the deed executed by the Haywood Furniture Company to the Robbins Furniture Company, with respect to the conveyance by said deed of the property described therein; or that said plaintiffs, or either of them, received any benefit resulting from the execution of said deed; or that said plaintiffs by their conduct subsequent to the execution of said deed, gave the defendants any reasonable grounds to believe that said plaintiffs or either of them would not assert their rights as creditors of the Haywood Furniture Company.

While, ordinarily, the trial court should submit to the jury all the issues of fact raised by the pleadings, where, as in the instant case, there was no evidence tending to support an affirmative answer to an issue, the refusal of the court to submit such issue, although duly tendered by the party who has the burden of the issue, will not be held for reversible error, on the appeal of such party. A new trial will be granted only where the court has refused to submit an issue raised by the pleadings, and when there was evidence tending to support the contention of the party who has excepted to such refusal.

We find no error in the trial of either of the above-entitled actions. The judgments are affirmed.

No error.

MRS. NETTIE M. HEATH v. MONCRIEF FURNACE COMPANY.

(Filed 18 February, 1931.)

Limitation of Actions B a—Right of action on warranty in this case held to accrue when attempts to remedy defect were abandoned.

Where a warranty is prospective as to a contract, as in this case, a written guarantee that a heating plant to be installed in a building according to plans and specifications would be free from defects and flaws and capable of heating the building to a temperature of 70 degrees with an external temperature of 10 degrees below zero, the statute of limitations does not begin to run in favor of the contractor from the date of the contract, C. S., 441, as the cause of action will not be deemed to have accrued at that time, and where the evidence is to the effect that the fault had repeatedly been called to the contractor's attention with the latter's ineffectual attempts to remedy it, upon which the owner relied until it was demonstrated that the plant was inadequate and could not be put in shape to comply with the warranty: *Held,* a motion as of nonsuit under the defendant's plea of the statute barring the action in three years from the time of making the contract is properly denied.

STACY, C. J., dissents.

APPEAL by defendant from *Harwood, Special Judge,* at September Special Term, 1930, of MECKLENBURG. No error.

On 27 June, 1924, the defendant contracted and agreed, in writing, with plaintiff "to furnish and install a combined heating and ventilating plant in your new apartment house on Central Avenue (in the city of Charlotte) according to attached plans and specifications for $1,760." It was stipulated and agreed that the contract price should be paid in three installments, the final installment to be paid on the completion of the plant.

The plans and specifications attached to and forming a part of said contract contains a paragraph as follows:

"Guarantee. This system is guaranteed to be free from all defects and flaws and to heat the building to a temperature of 70 degrees Fr.

with an external temperature of 10 degrees below zero. The entire job to be tested and everything left in order."

It is provided in the contract that "the guarantee as set forth in the specifications is contingent upon payments being made as above outlined."

In accordance with its contract and agreement, the defendant furnished and installed in plaintiff's apartment house a heating and ventilating plant. This plant was operated from the latter part of October, 1924, to January 12, 1925. During this time the plant did not heat the apartment house satisfactorily, and in consequence of plaintiff's complaints, defendant made certain adjustments on said plant which apparently remedied the defects and increased its heating capacity. On 12 January, 1925, plaintiff, through her agent, accepted the plant and paid the final installment on the contract price. At said date defendant endorsed on the contract these words: "All payments under this contract have been duly made in full and on time; the guarantee expressed in the contract and specifications is ratified, confirmed and in full force. Moncrieff Furnace Company, by J. B. Lee."

This action was begun on 23 March, 1929. It is alleged in the complaint that "the furnace and heating system installed by defendant in said apartment house was inadequate to heat said apartment house, was defective, and did not in any respect fulfill the guarantee as contained in defendant's contract. That not only did the said furnace and system not heat the building, but it from time to time emitted throughout the apartment house clouds of dust, gases and smoke which ruined the walls and decorations of the apartments and necessitated the repairing and redecoration of the inside of the said apartments from time to time at great expense to the plaintiff."

"8. That on account of the defectiveness and inadequacy of the said heating system, the tenants in the said apartment house became dissatisfied and a large number of tenants moved out and left the said apartment house on account of the defectiveness of the said heating system and on account of the dirt, smoke and gases emitted therefrom, and plaintiff was greatly damaged by reason of the loss of tenants and the rentals on the said building, all as a direct result of the inadequacy and defectiveness of the said heating system and its failure to come up to the guarantee contained in the contract."

"9. That plaintiff complained to the defendant frequently and at length and pointed out to defendant the defects in the said heating system, and that defendant from time to time made efforts to rectify the defects in the said heating system and to render it adequate to heat the said apartment house according to the contract, but the defendant never succeeded in remedying the defects in the said heating system and never put it in condition so that it would perform according to the terms of the contract, although plaintiff from time to time, and continually demanded that defendant do so."

"10. That in the spring of the year 1928 the said heating system having failed to heat the said apartment house adequately according to the contract, and having been so defective as to render the apartment filthy with smoke, dirt, and grime, practically all the tenants in the said apartment house notified plaintiff that they would move out and refuse to remain therein unless the heating system was put in proper condition or a new heating system installed. Defendant having failed and refused to properly remedy the said heating system, plaintiff, having no other recourse, did in the summer of 1928 remove the said heating system from the apartment house and installed a new system, all at great expense to her."

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff and defendant enter into a contract as alleged in the complaint? Answer: Yes.

2. Did the defendant breach its warranty as alleged in the complaint? Answer: Yes.

3. Is the plaintiff's cause of action barred by the statute of limitations, as alleged in the answer? Answer: No.

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,156.45."

From judgment on the verdict, defendant appealed to the Supreme Court.

Taliaferro & Clarkson for plaintiff.
Bridgers, Orr & Vreeland and S. E. Vest for defendant.

CONNOR, J. The cause of action on which plaintiff seeks to recover in this action, as alleged in the complaint, is a breach of the warranty contained in the contract under which defendant furnished and installed in plaintiff's new apartment house a heating and ventilating plant. It is not alleged in the complaint, nor was it contended at the trial that the plant furnished and installed by defendant was not according to the plans and specifications attached to and forming a part of the contract. In addition to its contract to furnish and install a plant according to said plans and specifications, defendant guaranteed the plant so furnished and installed "to be free from all defects and flaws and to heat the building to a temperature of 70 degrees Fr. with an external temperature of 10 degrees below zero." This guarantee or warranty, under the terms of the contract, was in force from and after 12 January, 1925.

The breach of the warranty, as alleged in the complaint, was established by the evidence offered at the trial by plaintiff, as appears from the answer of the jury to the second issue. No errors are assigned by the defendant on its appeal to this Court with respect to the trial of the second issue. At the trial, defendant relied chiefly on its contention that the action was barred by the statute of limitations, for that the action was not commenced within three years from the date on which the cause of action accrued. C. S., 441. On its appeal to this Court, defendant assigns as error the rulings of the trial court upon questions of law presented by this contention. The determinative question presented for decision is, when did the cause of action alleged in the complaint, and established by the answers to the first and second issues submitted to the jury, accrue? The defendant contends that the cause of action in the instant case accrued at the date of the warranty; the plaintiff contends that on the facts alleged in the complaint and shown by all the evidence, the cause of action did not accrue until after the lapse of a reasonable time during which it was discovered by both plaintiff and defendant, after repeated tests, that there was a breach of the warranty.

In *Baucum v. Streater,* 50 N. C., 70, and in *Taylor v. McMurray,* 58 N. C., 357, it was held by this Court that the statute of limitations against an action to recover damages for the breach of a warranty that the subject-matter of a sale was sound at the date of the sale, begins to run at the date of the warranty, and not thereafter. In each of these cases the warranty was construed as a contract by the vendor that if the vendee should suffer damages resulting from a condition existing at the date of the warranty, the vendor would pay such damages to the vendee. The cause of action accrued at the date of the warranty, for if breached at all, the warranty was breached at its date. For this reason it was held that the statute of limitations began to run at the date of the warranty, and not at the date when the damage resulting from the breach of the warranty was sustained. The principle on which the decision in each of these cases rests, has been generally recognized as sound. 37 C. J., 835.

Where, however, the warranty has been construed as a contract by the vendor that if the vendee shall suffer damages resulting from a prospective as well as a present condition, it has been held that a different rule applies. In some cases, as in *Sheehy Co. v. Eastern Imp. & Mfg. Co.,* 44 App. D. C., 107, L. R. A., 1916F, 810, it has been held that the statute of limitations runs from the date on which the vendee discovered or should have discovered the breach of the warranty; in other cases, as in *Felt v. Reynolds Fruit Evap. Co.* (Mich.), 18 N. W., 378, it has been held that the statute begins to run only after the lapse of a reasonable time within which both the vendor and the vendee had an opportunity to discover, by tests, whether or not there has been a breach of the warranty. In the latter case, it was said by *Cooley, C. J.*, that where the vendor and the vendee, as contemplated by them when the contract was entered into, were engaged for some time after the date of the warranty in making tests to determine whether or not there had been a breach of the warranty, this time was a criterion as to the time required for that purpose.

In the instant case, all the evidence tends to show that the defendant within three years from the date on which the action was commenced, in response to repeated complaints from the plaintiff, was engaged from time to time in testing the heating plant installed by the defendant, and in efforts to make the plant perform in accordance with the warranty. During this time plaintiff was patiently relying upon the repeated assurance of defendant that it would make the plant comply with its warranty. Upon all the facts of this case, the cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that the plant was not free from all defects and flaws and would not heat the building to a temperature of 70 degrees Fr. with an external temperature of 10 degrees below zero. There was evidence tending to show that this date was within three years of the date on which the action was commenced. Hence, there was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, or in its refusal to instruct the jury as prayed by defendant. We find no error in the charge. The judgment is affirmed.

No error.

STACY, C. J., dissents.

CLARA A. SALTER v. EDMUND GORDON.

(Filed 18 February, 1931.)

Negligence A c—Where landlord is not under duty to repair premises, sublessee may not recover from him for injury resulting from failure to repair.

For damages against a landlord caused by a negligent condition of the premises a sublessee can have no greater claim against the landlord than his lessor, and in the absence of evidence that the landlord was under obligation to keep the premises in repair a judgment as of nonsuit is properly entered.

APPEAL by plaintiff from *Harris, J.*, at September Term, 1930, of CURRITUCK. Affirmed.

George J. Spence for plaintiff.
C. R. Morris and M. B. Simpson for defendant.

PER CURIAM. The defendant owned a building in Norfolk, Virginia, which had been rented by the plaintiff's husband as sublessee. On the second story there was a balcony from which the plaintiff fell to the pavement, sustaining personal injury. She brought suit for damages, alleging that her fall was due to the negligence of the defendant in failing to keep the railing on the balcony in a reasonably safe condition. At the close of the plaintiff's evidence the action was dismissed as in case of nonsuit. The plaintiff excepted and appealed.

A sublessee can have no greater claim against the landlord than the tenant would have under like circumstances. *Jordan v. Miller,* 179 N. C., 73. In the absence of an agreement as to repairs the landlord is not obligated to keep the building in repair for the benefit of his tenant. *Improvement Co. v. Coley-Bardin,* 156 N. C., 255; *Fields v. Ogburn,* 178 N. C., 407; *Tucker v. Yarn Mill Co.,* 194 N. C., 756. The record contains no evidence of the landlord's agreement to make repairs. Judgment

Affirmed.

S. M. COMBS v. F. T. PAUL AND WIFE, MARJORIE PAUL.

(Filed 18 February, 1931.)

Appeal and Error J d: J e—Burden is on appellant to show substantial or prejudicial error.

On appeal the presumption is against the appellant and the burden is on him to show clearly not only that error was committed in the lower court, but that it was substantial or prejudicial.

APPEAL by defendants from *Harris, J.,* at December Term, 1930, of BEAUFORT. Affirmed.

This is a controversy without action. The following judgment was rendered in the court below:

"This controversy without action coming on to be heard before Hon. W. C. Harris, judge presiding, at December Term, 1930, of the Superior Court of Beaufort County, the plaintiff being represented by Harry McMullan, and the defendant by J. D. Paul; and it appearing and being found as a fact by the court that under a judgment rendered in suit in the Superior Court of Beaufort County, North Carolina, in which S. M. Combs was plaintiff and A. A. Paul and A. B. Mery were defendants, A. A. Paul was duly served with summons personally, and the defendant, A. B. Mery was duly served with summons by publication; and under a decree duly entered in said cause, the register of deeds of Beaufort County has entered upon the margin of the record of the mortgage from A. A. Paul to A. B. Mery, dated 15 November, 1919, recorded in Book 215, at page 540, the following: 'This mortgage is canceled by a decree of the Superior Court of Beaufort County in a suit of S. M. Combs *v.* A. A. Paul and A. B. Mery, dated 17 March, 1930, recorded in the clerk's office in Book of Orders and Decrees No. 15, at p. 129. Noted as ordered in said decree. 18 March, 1930. G. Rumley, Register of Deeds.' And the court being of the opinion as a conclusion of law that the said cancellation of the said mortgage from A. A. Paul to A. B. Mery was duly canceled of record; it is, upon motion of Harry McMullan, attorney for the plaintiff, ordered, adjudged and decreed that the said mortgage from A. A. Paul to A. B. Mery is duly canceled of record, and upon the facts submitted to the court, it is ordered, adjudged and decreed that the defendants, F. T. Paul and wife, Marjorie Paul, shall forthwith pay over and deliver to the plaintiff, S. M. Combs, the securities deposited with the said F. T. Paul and wife by the said S. M. Combs as protection against liability by reason of the said mortgage."

Harry McMullan for plaintiff.
J. D. Paul for defendants.

PER CURIAM. The defendant's sole assignment of error is to the court below signing the judgment above set forth.

It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Again, error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him.

From the above well settled law in this jurisdiction, the record does not disclose any prejudicial or reversible error. The judgment of the court below is

Affirmed.

J. GOLDMAN & COMPANY, INC., v. TRANNIE CRANK, SUSIE CRANK, W. D. TAYLOR ET AL.

(Filed 18 February, 1931.)

1. **Evidence J a—Party claiming under contract may not introduce parol evidence contradicting the terms of the written instrument.**

   One who claims under a written contract, though not a party thereto, is bound by its terms, and may not introduce parol evidence contradicting the provisions of the written instrument.

2. **Fraudulent Conveyances A e—Purchaser of bulk of property of insolvent is not liable for insolvent's debts in absence of agreement.**

   The vendors of a shoe shop sold their business under a written agreement that they, the vendors, would pay the outsanding obligations of the business. One of the creditors of the business at the time of the transfer sued to recover from the purchaser the amount of the indebtedness, and offered evidence tending to contradict the writing and holding the purchaser liable: *Held*, the parol evidence is inadmissible, and the question of whether the bulk-sales statute had been complied with was immaterial, C. S., 1013, since under the provisions of the statute the creditor, at most, would be entitled to have the transfer set aside, but not to hold the purchaser personally liable.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1930, of PASQUOTANK. Affirmed.

This is an action to recover on an account for articles of personal property sold and delivered, during the year 1928, by plaintiff to defendants, Trannie Crank and Susie Crank, and used by said defendants in carrying on their business known as "Crank's Shoe Shop."

From judgment by default final that plaintiff recover of said defendants the amount of said account, there was no appeal.

On 10 May, 1930, the defendants, Trannie Crank, and Susie Crank, sold their shoe shop to the defendant, W. D. Taylor. It is alleged in the complaint that the said defendant, W. D. Taylor, agreed with the defendants, Trannie Crank and Susie Crank, that he would pay the account due at the date of said sale to the plaintiff, as part of the purchase price for said shoe shop. This allegation is denied in the answer of the defendant, W. D. Taylor.

The bill of sale for said shoe shop, which is in writing, was offered in evidence at the trial by the plaintiff. It is provided therein that the defendants, Trannie Crank and Susie Crank, vendors, shall pay "all bills then due by the shop." Plaintiff offered parol testimony tending to show that defendant, W. D. Taylor, agreed to pay the bill due to the plaintiff, as alleged in the complaint.

It is further alleged in the complaint that the defendants, Trannie Crank and Susie Crank, failed to comply with the provisions of C. S., 1013, known as the "Bulk Sales Statute," prior to the sale of said shoe shop to the defendant, W. D. Taylor. There was no evidence at the trial tending to show such compliance.

From judgment dismissing the action as to the defendant, W. D. Taylor, plaintiff appealed to the Supreme Court.

McMullan & LeRoy for plaintiff.
M. B. Simpson for defendants.

PER CURIAM. The principle on which it is uniformly held in this State that parol testimony is not admissible as evidence to contradict or alter the terms of a written instrument, in an action between the parties to the instrument, is well settled. *Lytton Mfg. Co. v. House Mfg. Co.*, 161 N. C., 430, 77 S. E., 233. This principle is applicable in the instant case, for the plaintiff, although not a party to the bill of sale, is claiming under the contract between the defendants, Trannie Crank and Susie Crank, and the defendant, W. D. Taylor.

It is immaterial that the provisions of C. S., 1013, known as the "Bulk Sales Statute," were not complied with in the instant case. If the statute was applicable to the sale of the shoe shop, it does not follow that the defendant, W. D. Taylor, as purchaser of the "Crank Shoe Shop," became personally liable for the debts of the defendants, Trannie Crank and Susie Crank, the vendors, contracted by them in carrying on their business, as the result of noncompliance with its provisions. At most, the sale of the shop was void as to the plaintiff, who was a creditor of the vendors at the date of the sale.

There was no evidence at the trial of this action tending to show that the defendant, W. D. Taylor, is personally liable to plaintiff, on the account, for articles of personal property sold and delivered by plaintiff to the defendants Trannie Crank and Susie Crank. There is, therefore, no error in the judgment dismissing the action as to the defendant, W. D. Taylor. The judgment is

Affirmed.

STATE v. CLYDE STALEY AND FELIX STALEY.

(Filed 25 February, 1931.)

Bail B e—Where defendant flees court after conviction, while at large under bail bond until judgment be pronounced, the surety on bond is liable.

Where a bail or appearance bond in a criminal action provides that the defendant would appear for trial at a certain term of court, and "not depart the court without leave," the force of the bond continues until the case is finally disposed of, and where the trial court after conviction of the defendant permits him to go at large under the security of the bond so given, without the knowledge of the absent surety, and the defendant leaves the jurisdiction of the court before judgment is pronounced, and so remains at large, the surety is liable on the bond according to its tenor and import.

BROGDEN, J., dissents.

APPEAL by Felix Staley from *Harding, J.,* at March Term, 1930, of WILKES. Affirmed.

The judgment of the court below is as follows:

"The court finds as a fact that one defendant, Clyde Staley, was indicted in the court, and that the surety, Felix Staley, became his surety on the bond in the sum of $300, for his appearance at the August Term, 1928, the bond set out in the record; that at the August Term, 1928, the defendant was called and failed to appear. Judgment *ni si* was entered, against the defendant and his surety. *Sci. fa.* was served on the surety, Felix Staley, and the same returned, and an answer was filed as set out in the record.

The court finds as a fact that Clyde Staley appeared on the first day of the August Term, 1928, was tried under the bill of indictment and verdict rendered of guilty. The defendant was ordered in custody by the presiding judge and placed in jail. Before judgment was pronounced counsel for defendant, Clyde Staley, stated to the court that the defendant was under good bond, and asked that he might go under the bond from day to day until judgment could be pronounced. The court granted the request of the counsel for the defendant, and the defendant was released from custody under the bond given for his appearance at the August Term, set out in the record; that during the term and before judgment was pronounced, the defendant fled the court; that the court was unable to procure judgment for the reason that the defendant fled the court without leave, and the defendant has not yet been apprehended; that the surety has not brought him into court since that time; that at the time counsel requested the court to permit the defendant to be released from custody until judgment could be pronounced under the bond that he had given, the surety was not in court and had no information that such request was made or granted; that defendant was called out at said term, *instanta sci. fa.* ordered, *sci. fa.* was issued and served *instanta* on the surety at the August Term, 1928, and answer filed at the August Term, 1928.

The court finds the foregoing facts upon investigating the record and from representations made to the court by the counsel for the defendant and counsel for the surety at this term."

Upon the foregoing findings, judgment absolute was entered upon the *sci. fa.* against the surety, and the surety excepts and appeals to the Supreme Court. Notice of appeal waived in open court. Appeal bond fixed at $100. The case on appeal shall consist of the bill of indictment, the bond or undertaking given by the defendant, the *sci. fa.,* the answer to the *sci. fa.,* and the foregoing findings of fact."

The appearance bond is as follows: "We acknowledge ourselves indebted to the State of North Carolina in the sum of $300, jointly and severally, to be void if the said Clyde Staley and Felix Staley shall make personal appearance at the next term of the Superior Court to be held for the county of Wilkes, at the courthouse in Wilkesboro, on the first Monday this the .... Monday in August, 1928, next, to answer an indictment for A. and D. W., and not depart the same without leave.

CLYDE STALEY. (Seal.)
FELIX STALEY. (Seal.)

Taken and subscribed before me this 16th day of June, 1928.

O. G. ELLEDGE, *Sheriff.*
By Geo. Holland, Deputy Sheriff."

The only assignment of error by Felix Staley: "That his Honor erred in signing judgment as set out in the record, rendering judgment absolute against the surety upon the *sci. fa.*"

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Chas. G. Gilreath for Felix Staley.

CLARKSON, J. The appearance bond that Felix Staley signed as surety for Clyde Staley was to the effect that the said Clyde Staley should appear at the August Term, 1928, of the Superior Court of Wilkes County to answer an indictment for assault and with a deadly weapon "and not depart the same without leave." He appeared, was tried under the bill of indictment and found guilty, and ordered by the presiding judge into custody. Before judgment was pronounced, counsel for Clyde Staley stated to the court that he was under good bond and requested that he might go under the bond from day to day until judgment could be pronounced. The court granted the request and Clyde Staley was released from custody under the bond given for his appearance at the August Term, but, during the term and before judgment was pronounced, Clyde Staley fled and departed the court without leave.

Defendant Clyde Staley was called out at said term and *sci. fa.* was issued and served on the surety Felix Staley at said August Term.

The surety answered and contends that he is released from the bond, as Clyde Staley, after verdict of guilty was rendered against him, was ordered into custody and placed in jail and released without his knowledge or consent. We cannot hold, under the facts and circumstances of the case, that the bond was released. Felix Staley signed the bond with the clear provision that Clyde Staley should "not depart the same (court) without leave." Clyde Staley did depart without leave and thus violated the clear language of the bond which Felix Staley signed.

In *S. v. Hutchins,* 185 N. C., 694, a bond similar, with the provision "and shall not depart the court without leave" was given. Speaking to the subject, the Court, at p. 695, said: "In reference to bonds of this purpose and tenor, it has been uniformly held in this jurisdiction that they constitute a continuing obligation, and that neither principal nor surety is relieved until the cause is finally disposed of, or they are discharged by order of the court. *S. v. Eure,* 172 N. C., 875, and authorities cited. *S. v. White,* 164 N. C., 410; *S. v. Schenck,* 138 N. C., 560; *S. v. Morgan,* 136 N. C., 602; *S. v. Jenkins,* 121 N. C., 637; *S. v. Smith,* 66 N. C., 620."

It is a hard measure on the surety, but the bond which he signed in unmistakable language makes him responsible that the principal could not depart the court without leave, which the principal did. The judgment below is

Affirmed.

BROGDEN, J., dissents.

C. A. JOHNSON, SINKING FUND COMMISSIONER OF THE TOWN OF TARBORO, NORTH CAROLINA, v. V. E. FOUNTAIN AND MRS. SUE FOUNTAIN, ADMINISTRATRIX OF L. E. FOUNTAIN, DECEASED.

(Filed 25 February, 1931.)

1. **Bankruptcy E c—Where claimant has actual knowledge of bankruptcy proceedings in time to file claim and does not do so, claim is barred.**

   Where the maker of a note and the administratrix of a deceased endorser are sued by the payee, and the administratrix has paid the note and seeks to recover from the maker, and the maker sets up that he had been discharged in bankruptcy from liability on the claim, although he had failed to list the claim in the schedule of his liabilities, and introduces evidence tending to show without contradiction that the payee and the administratrix had actual notice of the bankruptcy proceedings in ample time to have filed the claim within six months after the adjudication of bankruptcy: *Held,* sufficient to support an instruction that if the jury believed the evidence, they should answer the issue in defendant's favor as to whether the claim was barred, and an instruction in effect directing a verdict for the administratrix if she had no notice or opportunity to attend the first creditor's meeting, is reversible error.

2. **Evidence D c—Where pleadings do not raise an issue as to estoppel evidence tending to support an estoppel is incompetent.**

Where a discharge in bankruptcy is a bar to the liability of a maker of a note, parol evidence offered as an estoppel to the plea of discharge is incompetent when the pleadings do not raise the issue of such estoppel.

3. **Bankruptcy C d—Person who is surety on debt of bankrupt may prove claim in creditor's name if he fails to do so.**

Under the provisions of the bankrupt act a person securing the debt of a bankrupt by individual undertaking may prove the claim against the bankrupt in the creditor's name, or if he discharges the claim in whole or in part he is subrogated to the rights of the creditor, and failure to prove a claim provable under this provision results in the claim being barred by the bankrupt's discharge.

APPEAL by defendant, V. E. Fountain, from *Cranmer, J.,* at November Term, 1930, of EDGECOMBE. New trial.

This action was begun on 12 July, 1928. In his complaint, plaintiff alleges that on or about 1 January, 1926, the defendant, V. E. Fountain, as maker, and L. E. Fountain, intestate of the defendant, Mrs. Sue Fountain, administratrix, as endorser, executed a promissory note by which they promised, jointly and severally, to pay to the plaintiff or his order, on or before 1 January, 1927, the sum of two thousand dollars, with interest at the rate of six per cent per annum after date, for value received; and that the amount of said note, with interest thereon, is now due and payable, no part thereof having been paid.

On these allegations, plaintiff prays judgment that he recover of the defendant, V. E. Fountain, as principal, and of the defendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, as endorser, the sum of $2,000, with interest thereon from 1 January, 1927, and the costs of the action.

The defendant, V. E. Fountain, answering the complaint, admits the allegations therein, and in bar of the "right of any party to this action to recover of him the amount of said note," alleges:

"(a) That on 6 December, 1926, an involuntary petition in bankruptcy was filed against him in the District Court of the United States for the Eastern District of North Carolina; the defendant, V. E. Fountain, then went into said court and admitted his bankruptcy and filed in said court his schedule, setting forth a list of his creditors and their respective places of residence (except as hereinafter modified) and the amount due each, and also an inventory of his property, rights, credits and effects, of every kind and nature, and alleged that he was a resident and citizen of the Eastern District of North Carolina, and was owing debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, and that he was unable to pay said debts, and other matters and things set forth more particularly in said schedule.

(b) That afterward, to wit, on 14 December, 1926, the defendant, V. E. Fountain, was by said court duly adjudged a bankrupt, and afterward, to wit, on 3 October, 1927, a decree was entered by Hon. I. M. Meekins, United States Judge for the Eastern District of North Carolina, discharging the defendant from all his debts.

(c) That the cause of action set forth in the plaintiff's complaint was due and owing to the plaintiff before the defendant, V. E. Fountain, was declared a bankrupt, and before the said V. E. Fountain, defendant, received his discharge, as hereinbefore set forth, and said debt was one provable against his estate in bankruptcy, and was not created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.

(d) That this defendant, V. E. Fountain, did not set forth in his schedule the indebtedness sued on in this action, nor the name of the plaintiff in this action, or that said note was endorsed by L. E. Fountain, or that said L. E. Fountain or Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, was liable as an endorser on said note, the said L. E. Fountain having died on 23 November, 1926, and Mrs. Sue Fountain having qualified as his administratrix before the clerk of the Superior Court of Edgecombe County on 18 December, 1926; the reason thereof being that this defendant, during all of said time, was under the impression that he had paid plaintiff in full the note sued on in this action, by the substitution of another note due this defendant by another, which last note was secured by some collateral security.

(e) That although the said V. E. Fountain, defendant, did not file in said court the claim or note sued on in this action, yet both the plaintiff in this action, and Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, had full and actual knowledge, and full and actual notice, of the proceedings in bankruptcy instituted against the said V. E. Fountain, defendant, from the very beginning to the end of said bankruptcy proceedings, with full and ample opportunity to take part in said proceedings in bankruptcy against the said V. E. Fountain, defendant, from the beginning to the end of the same.

(f) That neither the plaintiff in this action nor Mrs. Sue Fountain, administratrix of said L. E. Fountain, deceased, filed the claim of the plaintiff in this action with the trustee of said V. E. Fountain, nor did they take any part in said bankruptcy proceedings against said V. E. Fountain, defendant.

(g) That the defendant, V. E. Fountain, is advised, informed and believes, and so avers, that in consequence of the plaintiff and Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, having full knowledge of the bankruptcy proceedings instituted against said V. E. Fountain, defendant, from its beginning to its end, and their consequent failure to take any part in said bankruptcy proceedings, or in the court, and to file in court the note or claim sued on in this action, the defendant, V. E. Fountain, is completely discharged as to any liability for and on account of said note or claim sued on, and that there can be no recovery against him by any one in this action for and on account of said note or claim."

On the allegations in this answer, in support of his plea in bar, the defendant, V. E. Fountain, prays judgment that the action be dismissed as to him, and that it be adjudged that he is not liable for and on account of the note or claim sued on in this action, and that he go without day and recover his costs.

The defendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, answering the complaint, admits the allegations therein; further answering the complaint, the said defendant alleges that she has in hand certain certificates of stock deposited by the defendant, V. E. Fountain, as collateral security for the note sued on. She prays that said certificates of stock be sold under the orders of the court, and that the proceeds of said sale be applied as a payment on the note sued on in this action. She further prays for judgment that the plaintiff recover of her, in her administrative capacity, only the amount due on said note, after the proceeds of the sale of the collateral security held by her have been applied as a payment on said note, and that the defendant, V. E. Fountain, as maker of said note, is primarily liable for the amount of the said judgment, and that she, as administratrix of L. E. Fountain, the endorser of said note, is secondarily liable for said amount.

Neither the plaintiff nor the defendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, filed a reply to the further answer of the defendant, V. E. Fountain, in which the said defendant alleges his discharge in bankruptcy, and pleads said discharge in bar of any recovery against him in this action.

On 13 August, 1928, on motion of attorneys for the plaintiffs, judgment was rendered by the clerk of the Superior Court of Edgecombe County on the pleadings that the plaintiff recover of the defendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, as endorser of the note sued on in this action, the sum of $2,000, with interest thereon from 1 January, 1927, and the costs of the action. In said judgment it was ordered "that this cause be transferred to the civil issue docket for trial upon the issues raised by the pleadings." There was no exception to or appeal from this judgment.

It appears from the record that on 11 February, 1929, the defendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, paid to the plaintiff the amount of said judgment, and that thereupon the plaintiff duly assigned said judgment to a trustee for said defendant.

In accordance with the order of the clerk of the Superior Court, the action was tried at November Term, 1930, of the Superior Court of Edgecombe County. At this trial the following issues were submitted to the jury:

"1. Was the claim sued on in this action, to wit, a note executed by V. E. Fountain and endorsed by L. E. Fountain, listed among the liabilities of V. E. Fountain, bankrupt?

2. Did Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, have notice of the bankruptcy of V. E. Fountain in time to avail herself of all her rights as a creditor of the bankrupt's estate?"

The first issue was answered "No," by consent.

The defendant, V. E. Fountain, assumed the burden on the second issue and offered in evidence a certified copy of an order made by the Honorable I. M. Meekins, U. S. District Judge, in the matter of V. E. Fountain, bankrupt, and dated 3 October, 1927. By this order the defendant, V. E. Fountain, bankrupt, was discharged from all debts and claims, provable under the acts of Congress against his estate, which existed on 6 December, 1926, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

The defendant testified that he did not list the note sued on in this action in the schedule of his debts and liabilities filed by him in the bankruptcy proceeding; that the plaintiff in this action, however, had actual knowledge of the pendency of said proceeding within ten days after the petition therein was filed by his creditors, and talked with the witness about the proceeding; and that his codefendant, Mrs. Sue Fountain, administratrix of L. E. Fountain, deceased, who had endorsed the note sued on in this action, also had actual knowledge of said bankrupt proceeding, during the month of January, 1927, and talked with the witness about the proceeding, and its effect upon her liability as administratrix of L. E. Fountain, deceased, on said note. The witness said: "My estate was closed about six months after I was adjudged a bankrupt on 14 December, 1926. Notice of the first meeting of creditors was published in a newspaper." The first meeting of creditors was held in Tarboro, N. C., on 4 January, 1927, pursuant to the notice.

The defendant, Mrs. Sue Fountain, administratrix, testified that the first time she knew that the defendant, V. E. Fountain, was in bankruptcy, was in January, 1927, when she was notified by the bank that the note sued on in this action had not been paid, when it became due on 1 January, 1927. She then talked with V. E. Fountain and he told her that he was in bankruptcy. She said: "I found out about his being in bankruptcy when I called him up and asked him what he was going to do about the note. I found out in January, 1927, that V. E. Fountain was in bankruptcy. I do not remember the day of the month." The witness testified that she did not see the notice in the newspaper of the first meeting of the creditors of V. E. Fountain, bankrupt.

The witness testified further that on one occasion during the summer of 1927—possibly in June—she had a conversation with V. E. Fountain about filing a claim on the note in the bankrupt court; that he told her on that occasion that he had not listed the note in the schedule of his debts and liabilities filed by him in the bankrupt court, and did not want her to file a claim on account of the note; that he was going to pay every penny of the note.

The defendant, V. E. Fountain, in apt time, objected to this testimony and excepted to the refusal of the court to exclude the same as evidence.

The witness further testified that she did not file a claim on the note in the bankrupt court, and received no dividend from said court on account of the note sued on in this action.

There was no evidence tending to show that the plaintiff, as payee, filed a claim in the bankrupt court, or received a dividend from said court, on account of said note.

After the close of all the evidence, and in apt time, the defendant, V. E. Fountain, requested the court, in writing, to instruct the jury as follows:

"If you believe the evidence in this case, I charge you to answer the second issue, 'Yes.' "

To the refusal of the court to so instruct the jury, the said defendant excepted.

The court instructed the jury that if they found from the evidence that the defendant, Mrs. Sue Fountain, administratrix, did not see the notice published in the newspaper calling the first meeting of the creditors of V. E. Fountain, bankrupt, on 4 January, 1927, and had no opportunity to attend said meeting and file a claim on the note sued on in this action, they should answer the second issue, "No."

To this instruction the defendant, V. E. Fountain, duly excepted.

The jury answered the second issue, "No." From judgment on the verdict, and on the admissions in the pleadings, that the defendant, Mrs.

Sue Fountain, administratrix of L. E. Fountain, deceased, recover of the defendant, V. E. Fountain, the sum of $2,000, with interest thereon from 1 January, 1926, and the costs of the action, the defendant, V. E. Fountain, appealed to the Supreme Court.

H. H. Phillips for defendant, V. E. Fountain.
Geo. M. Fountain for defendant, Mrs. Sue Fountain, administratrix.

CONNOR, J. In *Williams v. U. S. Fid. & Guar. Co.,* 236 U. S., 549, 59 L. Ed., 713, it is said: "It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve an honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from obligations and responsibilities consequent upon business misfortunes." The provisions of the bankrupt act, enacted by Congress as authorized by the Constitution of the United States, are just to creditors, and are founded upon a wise public policy. They assure each creditor that the assets of his insolvent debtor will be equitably distributed among all his creditors. They relieve an honest debtor of liability for debts which he has no hope of paying and after his discharge, enable him to perform his duties as a member of society, free from embarrassments which would destroy his self-confidence and deprive him of all hope of economic independence. In the instant case, there is no suggestion on the record that the creditors of V. E. Fountain, bankrupt, who proved their claims against his estate in bankruptcy, have not received, or that said bankrupt was not entitled to all the relief afforded by the just and wise provisions of the bankruptcy act.

It is provided in section 35 of the bankruptcy act that "discharge in bankruptcy shall release a bankrupt from all his provable debts," except such as are specified therein, including such as "have not been fully scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

The note sued on in this action was a provable debt of the defendant, V. E. Fountain, at the date of the filing of the petition by which the proceedings in which he was adjudged a bankrupt were instituted. This debt was not listed in the schedule filed by the bankrupt in time for its proof and allowance as a claim against his estate. The said defendant was not, therefore, released from liability on the note by his discharge, unless, as alleged by him, his creditor had notice or actual knowledge of the proceedings in bankruptcy against him.

The uncontradicted evidence at the trial tended to show that the plaintiff, who was the creditor of the bankrupt, with respect to the note set out in the complaint, had actual knowledge of the bankruptcy proceeding within ten days after the filing of the petition, and that he did not prove or file his claim on account of the note.

It is further provided in the bankrupt act that "whenever a creditor whose claim is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." Section 93(i). Accordingly, it has been held that a claim provable under this provision, but not proved, is barred by the bankrupt's discharge. *Smith v. Wheeler,* 55 App. Div., 170, 66 N. Y. S., 780.

All the evidence at the trial tends to show that the defendant, Mrs. Sue Fountain, administratrix, had notice or actual knowledge of the bankruptcy proceedings against the defendant, V. E. Fountain, some time during the month of January, 1927. The defendant was adjudged a bankrupt on 14 December, 1926. As a creditor or other person entitled to prove a claim against the estate of a bankrupt has six months from the date of the adjudication within which to prove and file his claim, the said defendant had ample time, after she first knew that V. E. Fountain was in bankruptcy, to prove and file a claim on the note sued on in this action. There was error in the refusal of the court to instruct the jury as requested by the defendant, V. E. Fountain, that if they believed all the evidence in this case, they should answer the second issue, "Yes." It follows that there was error in the instructions of the court to the jury which the defendant, V. E. Fountain, assigns as error in this appeal.

The testimony of Mrs. Sue Fountain, administratrix, as to her conversation with the defendant, V. E. Fountain, during the summer of 1927—possibly in June—in which he told her that he had not listed the note sued on in this action in the schedule of his debts filed in the bankruptcy proceeding, and that he did not want her to file a claim on the note, was incompetent as evidence, and should have been excluded. This testimony was offered, manifestly, for the purpose of supporting a contention that the defendant, V. E. Fountain, was estopped from pleading his discharge in bankruptcy as a bar to a recovery against him in this action. It is sufficient to say that no issue as to such estoppel is raised by the pleadings. Nor was evidence tending to show an estoppel relevant to the matters involved in the second issue, which alone was submitted to the jury.

For errors in the trial of the action the defendant, V. E. Fountain, is entitled to a

New trial.

EAST CAROLINA RAILWAY v. ZIEGLER BROTHERS.

(Filed 25 February, 1931.)

Contracts A d—Promise of railroad to provide certain rate to point on its line held to be sufficient, valid consideration to support contract.

The giving up of a legal right to the promisor's detriment is a sufficient consideration to support a contract, and where a railroad company lawfully agrees to transport freight to a certain point on its line for the defendant at a certain rate, the railroad company has given up a legal right which is sufficient to support the agreement of the shipper to exclusively use its line, although thereafter the rate would be available to all shippers in the same circumstances, and the railroad company may recover damages from the shipper for breach of performance on his part.

APPEAL by defendants from *Cranmer, J.*, at November Term, 1930, of EDGECOMBE. Affirmed.

A. C. Davis and Battle & Winslow for appellants.
H. H. Phillips for appellee.

ADAMS, J. This is an action to recover damages for breach of contract. The plaintiff alleged "that on or about 13 October, 1928, the plaintiff and the defendants entered into a contract under and by virtue of the terms of which the defendants, in consideration of plaintiff's agreement to give to them the same freight rates to certain points on its railroad which defendants then had on shipments to Tarboro, N. C., agreed to locate their working operations and the terminal point of their shipments of sand, cement and stone at either West Tarboro or Davistown, points on the line of the plaintiff company, and further agreed to cause all of its shipments of sand, cement and stone to be made over the line of this company to such terminal"; that the plaintiff had fully complied with its agreement and that the defendants had failed to locate their working operations and the terminal point of their shipments at the place agreed upon and had failed to make all their shipments over the plaintiff's line; and that the plaintiff in consequence had been damaged.

The defendants demurred on the ground that the contract is *nudum pactum* for that: (a) If the promise of the plaintiff, alleged to be the consideration therefor, was to give the defendants the benefit of the same freight rates which were available to the public generally, it was a promise to do what the plaintiff was bound by law to do, and therefore not sufficient consideration to support a contract; (b) if the promise alleged as a consideration for the contract was the promise to give the defendants the benefit of different freight rates from those available to the public generally, the same was an unlawful discrimination, the promise to do an illegal act, and therefore not a sufficient consideration to support the contract.

The demurrer was overruled.

The contract consists of mutual promises; the defendants, therefore, made certain promises to the plaintiff. The modern conception of a consideration is not essentially a benefit to the promisor; one of the tests is whether there is a detriment to the promisee. The principle is stated in *Institute v. Mebane,* 165 N. C., 644, 651: "A valuable consideration in the sense of the law may consist either in some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him.' Anson on Contracts, 63. 'In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' Parsons on Contracts, 444. 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' 2 Kent's Com. (12 ed.), 465. Pollock, in his work on Contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: 'The second branch of this judicial description is really the most important one. Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the promise of the first.' *Hamer v. Sidway,* 21 Am. St. Rep. (N. Y.), 593."

The detriment suffered is set forth in the complaint. The plaintiff, under authority of law, put into effect, for the benefit of the defendants, tariff rates which were lower than those it was charging at the time the contract was made. Public Laws, Extra Session, 1920, ch. 56. The result was that it sustained a loss on the freight transported for other shippers who were entitled to the reduced rates. We find nothing in the complaint which indicates an unlawful discrimination. The reduction of rates was a benefit, not exclusively to the defendants, but to the general public. Judgment

Affirmed.

ELIZA KING, MARY BURCHETT, DORA BURCHETT AND LEE BURCHETT v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 25 February, 1931.)

1. **Railroads D b—Evidence of negligence held properly submitted to jury, and issue of contributory negligence tendered was properly refused.**

   Where in an action against a railroad company to recover damages for an alleged negligent personal injury there is evidence that the defendant's train was backed over a public highway crossing without giving any signal or warning and without a lookout on the rear of the train, and that it collided with an automobile in which the plaintiffs were riding as mere guests, and there is no evidence that the plaintiffs owned the car or had any control over the driver or were engaged in a common enterprise: *Held*, the evidence is sufficient to take the case to the jury on the issues of negligence and proximate cause, and the refusal to submit an issue as to the contributory negligence of the plaintiffs is not error, the negligence of the driver, if any, not being imputable to the plaintiffs. *Earwood v. R. R.*, 192 N. C., 27, cited and applied.

2. **Trial F a—Where there is no evidence to support issue tendered refusal to submit such issue is not error.**

   It is not error for the trial court to refuse to submit an issue to the jury as to plaintiff's contributory negligence raised by the pleadings when there is no evidence in support of such issue.

CIVIL ACTION, before *Devin, J.,* at May Term, 1930, of WARREN.

Each of plaintiffs instituted a suit for damages against the defendant, alleging in substance that on the afternoon of 29 November, 1926, they were traveling as gratuitous guests in an automobile owned and driven by Hunter Merrimon upon a public highway leading from Oakville, North Carolina, toward Warren Plains; that the tracks of defendant crossed said highway at grade. There is a North Carolina stop sign and a railroad cross-arm at the crossing.

The evidence tended to show that snow was falling and that about three o'clock in the afternoon the engineer of a locomotive engine backed said engine from Warren Plains toward Macon over said crossing and that at the time of reaching the crossing the engine was running 25 or 30 miles an hour. There was also testimony from several witnesses that there was no lookout on the back of the engine and no signal whatever was given for the crossing. The plaintiffs testified that just as they were about to cross the track they saw the engine and attempted to avoid the collision, but that the engine struck the car in which they were riding, inflicting personal injury. The evidence with respect to how far a train could be seen was conflicting and contradictory. There was evidence on behalf of plaintiffs that the vision was obstructed to the south by bushes and an embankment, and that by reason thereof a train could not be seen until a person got "right on the track." Another witness testified that "when within 20 feet of it I would say you could see 20 or 25 feet down the track." Another witness testified that when within 20 or 25 feet of the nearest rail of the track you could not see an engine very far. The defendant offered evidence by a civil engineer who actually made measurements that at a point 25 feet from the rail "I could see 1,550 feet." Another witness for defendant testified that when within 5, 6, or 7 feet of the crossing "You can see as far as your eyes will let you."

There was further evidence offered by the plaintiffs to the effect that the driver of the car stopped the car at the North Carolina stop sign; that the driver and all occupants of the car looked and listened, and that they continued to look all the way until the car was on the track. The driver of the automobile did not stop his engine and the curtains were up, but all the occupants testified that they were looking and listening.

There was no evidence that plaintiffs owned or had any control whatever over the car or the driver. Nor was there evidence of joint enterprise.

The cases were consolidated for trial and appropriate issues were submitted in behalf of each plaintiff. The jury answered the issue of negligence in favor of plaintiffs and awarded damages in the sum of $500 to each plaintiff. The defendant tendered an issue of contributory negligence in each case, which the trial judge refused to submit to the jury.

From judgment upon the verdict the defendant appealed.

George C. Green, Charles J. Katzenstein and William T. Polk for plaintiff.

Murray Allen and Julius Banzet for defendant.

BROGDEN, J. The liability of the defendant in this case is governed by the opinion in *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180. See, also, *McGee v. Warren,* 198 N. C., 672, 153 S. E., 162; *Smith v. R. R., ante,* 177; North Carolina Law Review, December, 1930, p. 98.

The defendant insists that it was the duty of the court to submit an issue of contributory negligence in each case. Of course, issues arise upon the pleadings and must be framed accordingly. Nevertheless, the trial judge is not required to submit an issue to the jury if there is no evidence to support it. *Brown v. Kinsey,* 81 N. C., 245; *Rice v. R. R.,* 174 N. C., 268, 93 S. E., 774; *Hoggard v. Brown,* 192 N. C., 494, 135 S. E., 331; McIntosh North Carolina Practice and Procedure, p. 545.

The record discloses no evidence of contributory negligence and the ruling of the trial judge was correct.

No error.

SURRY COUNTY v. GUY SPARGER.

(Filed 25 February, 1931.)

1. **Actions B b—Defendant in this case was agent and not officer of county, and injunction would lie to determine right to position.**

   Where a statute creating a county highway commission authorizes such commission to employ a superintendent of roads and such subordinates as may be necessary, and thereinafter refers to such superintendent and subordinates as "agents or employees": *Held,* the superintendent is an agent of the county and not an officer thereof, it appearing that the Legislature so contemplated him, and it is not necessary that the right of one claiming such office by appointment be tested by proceedings in the nature of a *quo warranto,* but injunctive proceedings will lie to enjoin him from exercising the authority of superintendent.

2. **Highways C a—Purchasing agent of Surry County held not to have power to employ road superintendent upon his sole authority.**

   In construing chapter 235, Public-Local Laws of 1919, chapter 141, Public-Local Laws of 1925, and chapter 167, Public-Local Laws of 1927, it is *held:* the county purchasing agent of Surry County is not authorized to employ a road superintendent upon his sole authority.

CIVIL ACTION, before *Finley, J.,* at August Term, 1930, of SURRY.

Chapter 235, Public-Local Laws of 1919, created a highway commission for Surry County, and in section 7 thereof, authorized said highway commission to employ a road superintendent and such subordinates as might be necessary to carry out the provisions of the law. Chapter 141, Public-Local Laws of 1925, created a new office for Surry County, known as purchasing agent, tax supervisor and bookkeeper. Chapter 167, Public-Local Laws of 1927, among other provisions, amended section 6 of the act of 1925 above referred to. Section 6, as amended, reads as follows: "That it shall be the duty of this officer, under the direction of the board of county commissioners, to act as general purchasing agent for any or all of the county departments or institutions under rules and regulations to be prescribed by the board of county commissioners. The duties and powers of such officer shall include purchases, employment and other contractual obligations of the highway commission of Surry County."

B. F. Folger was duly appointed purchasing agent, tax supervisor, etc., of Surry County. On 5 July, 1928, the said Folger recommended U. G. Belton as supervisor of roads of Surry County. It is alleged that Belton resigned as supervisor of roads and tendered his resignation to Folger. At any rate the board of county commissioners of Surry County adopted certain resolutions on 15 August, 1930, providing in substance that in the event there should be a vacancy in the position of road superintendent that the purchasing agent should recommend to the board of county commissioners a successor. On the same day Belton tendered his resignation as road superintendent to the board of commissioners, said board accepted the resignation, but directed that he should still perform the duties of the position until his successor should be appointed and qualified. Said board also notified Folger, the purchasing agent, to nominate or recommend a successor for Belton. Folger declined to nominate or recommend a successor for Belton, but it is alleged that without the approval of the board of county commissioners Folger had appointed Guy Sparger, the defendant, to act as road superintendent. Thereupon this action was instituted by the county to restrain Sparger from exercising the duties of the employment.

The judgment of the trial judge is as follows:

"This cause coming on to be heard, and being heard, before his Honor, T. B. Finley, judge of the Superior Court holding the courts for the Eleventh Judicial District of North Carolina, at the courthouse at Dobson, 25 August, 1930, being the time and place set by the order of Judge Clement, dated 16 August, 1930, and the court having considered the evidence introduced by the plaintiff, and the defendant, to wit, the petition and answer considered as affidavits, the affidavit of T. M. Marsh, clerk of the board of commissioners of Surry County, the minutes of the meeting of the board of commissioners of Surry County, held on 15 August, 1930, the minutes of the meetings of said board held on 14 June, and 5 July, 1928, and the first Monday in May, 1930, and the following Public-Local Laws of North Carolina:

Chapter 235, Session of 1919;
Chapter 141, Session of 1925;
Chapter 167, Session of 1927.

And the court being of the opinion that the purchasing agent for Surry County is not authorized by law to employ a road superintendent for the highways of said county on his sole authority; and it further appearing to the court that B. F. Folger, purchasing agent, has undertaken to his own authority to employ the defendant as road superintendent, and the defendant, prior to the institution of this action, had repeatedly stated his intention to undertake the duties of such employment, notwithstanding that such employment had not been ratified or confirmed either by the board of commissioners for Surry County or the highway commission for Surry County, and that such acts on his part would cause irreparable injury to the county of Surry, and would interfere with the orderly and lawful operation of the work of maintaining and repairing the highways of the county, and the plaintiff is, therefore, entitled to the relief prayed for in the petition.

It is, therefore, ordered, adjudged and decreed that the defendant, Guy Sparger, be and he is hereby restrained from assuming the employment as road superintendent for Surry County, from taking possession of the supplies and equipment of the county relating to highways, from taking charge of the work of maintaining and repairing highways, from directing any of the works of the employees of the highway commission, and from doing any other act or thing as or purporting to act as road superintendent of Surry County.

It is further ordered that this restraining order shall continue in effect until the final hearing."

From the foregoing judgment the defendant appealed.

Wm. Jackson and Parrish & Deal for plaintiff.
Folger & Folger for defendant.

BROGDEN, J. The question of law involved is the power of the purchasing agent of Surry County to appoint a road superintendent without the approval of the board of county commissioners.

Therefore, at the outset, the inquiry arises as to whether the remedy applicable to the facts is injunction or *quo warranto.* If *quo warranto* is the sole remedy, then the plaintiff cannot maintain this action. The applicability of the remedy of *quo warranto* depends upon whether or not the road superintendent of Surry County is an officer as contemplated and defined by law. This question is discussed in *Eliason v. Coleman,* 86 N. C., 236, and by McIntosh's North Carolina Practice and Procedure, section 964, page 1089, and cases cited in support of the text.

Chapter 235, Public-Local Laws of 1919, creating a highway commission for Surry County, authorizes said commission, in its discretion, to employ a road superintendent and such subordinates as may be necessary, and to delegate to him or such subordinates such power as the commission in its discretion may deem wise or expedient. In section 9 of the act it is provided that the commission "through its agent" is authorized to enter upon land, etc. In section 10 it is provided that any person who shall obstruct "the said commission, its agents or employees in making surveys or changing any road," etc., shall be guilty of a misdemeanor. Thus it appears that the General Assembly contemplated that persons employed by the highway commission of Surry County should be deemed to be agents and employees. These positive legislative declarations exclude the idea that the road superintendent was an officer as contemplated by law. Therefore, the plaintiff was not required to resort to *quo warranto* in order to maintain an action against the defendant.

The board of county commissioners directed the purchasing agent to recommend a qualified person for the position of road superintendent. None of the legislative acts referred to undertake to abolish the board of county commissioners or to deprive said board of the power to discharge the duties imposed upon it by law. Nor does chapter 167, Public-Local Laws of 1927, when read and construed in connection with section 6, chapter 141, Public-Local Laws of 1925, subordinate the board of county commissioners to the control of the purchasing agent with reference to the employment of a superintendent of roads.

Affirmed.

H. H. ELLIS v. FRED A. PERLEY, J. A. LANCE, J. C. CONELLY, AND J. D. ECKLES.

(Filed 25 February, 1931.)

Pleadings D c—Demurrer in this case held bad as speaking demurrer.

A demurrer to the complaint upon the ground that the statute conferring jurisdiction on the court is unconstitutional, is bad as a speaking demurrer and will be overruled.

CONNOR, J., concurs in result; STACY, C. J., dissenting.

APPEAL by defendant, J. D. Eckles, from *Oglesby, J.,* at December Term, 1930, of BUNCOMBE. Affirmed.

This is a civil action brought in the General County Court of Buncombe County, N. C., by plaintiff against defendants, to recover $8,444.62, and interest, due on certain promissory notes with sundry credits thereon.

The demurrer of J. D. Eckles in the General County Court of Buncombe County, N. C., is as follows: "Now comes the defendant, J. D. Eckles, and demurs to the complaint of the plaintiff herein and assigns as grounds for such his demurrer that this court has no jurisdiction of the subject of this action, for that the public statutes in virtue of which this court is attempting to exercise jurisdiction of this action violate the Constitution of North Carolina, and are, therefore, void."

The judge of the General County Court of Buncombe County, N. C., overruled the demurrer. Defendant J. D. Eckles appealed to the Superior Court and the judgment of the General County Court of Buncombe County, N. C., was affirmed and defendant J. D. Eckles appealed to the Supreme Court.

George W. Craig, J. W. Pless and George H. Ward for plaintiff.
Carter & Carter for defendant, J. D. Eckles.
J. G. Merrimon and Joseph W. Little for Buncombe County Bar Association—Amicus Curiæ.

Clarkson, J. We think the court below was correct in overruling the demurrer. In *Brick Co. v. Gentry,* 191 N. C., at p. 642, speaking to the subject: "A demurrer can be sustained, and it is only appropriate, when the defect or objection appears on the face of the pleadings, as it is not the province of a demurrer to state objections not apparent on the face of the pleading to which it is directed. A 'speaking demurrer,' as styled by the books, is one which invokes the aid of a fact, not appearing on the face of the complaint, in order to sustain itself, and is condemned, both by the common law and the Code system of pleading. *Besseliew v. Brown,* 177 N. C., 65; *VonGlahn v. DeRossett,* 76 N. C., 292." *Justice v. Sherard,* 197 N. C., 237; *Buchanan v. Feldspar Milling Co., ante,* at p. 53.

It is also said that "A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting for the purpose the truth of the allegations of fact contained therein." *Meyer v. Fenner,* 196 N. C., at p. 477; *Winston-Salem v. Ashby,* 194 N. C., at p. 390; *Efird v. Winston-Salem,* 199 N. C., at p. 35.

In *Enloe v. Ragle,* 195 N. C., at p. 38, speaking to the subject: "A general demurrer will not be allowed. A demurrer must distinctly specify the grounds of objection or it may be disregarded. It may be taken to the whole complaint or to any of the alleged causes of action stated therein. C. S., 512. A demurrer to the jurisdiction or that the complaint does not state facts sufficient to constitute a cause of action, will be treated as a motion to dismiss, and can be interposed *ore tenus* at any time, even in the Supreme Court. The Supreme Court may raise the question *ex mero motu. Seawell v. Cole,* 194 N. C., p. 546." "Speaking demurrer" is bad. *Reel v. Boyd,* 195 N. C., 273.

For the reasons given, the judgment of the court below is
Affirmed.

Connor, J., concurs in result.

STACY, C. J., dissenting: I think the question of jurisdiction over the subject of the action is properly presented by the defendant's demurrer and should be decided, even though it challenges the validity of the statute which confers civil jurisdiction on the General County Court of Buncombe County. *Williams v. Williams,* 188 N. C., 728, 125 S. E., 482; *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593; McIntosh's N. C. P. & P., pp. 56 and 448; Clark on Code Pleading, 358. See, also, *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175. But in deference to the contrary view of the majority, I withhold any opinion on the validity of said statute.

CITY OF GOLDSBORO ET AL. v. W. P. ROSE BUILDERS SUPPLY COMPANY ET AL.

(Filed 25 February, 1931.)

1. **Appeal and Error J g—Validity of zoning ordinance held not necessary to be determined on present record.**

   In a suit by adjacent property owners and a city to restrain the erection of a gasoline filling station on the ground that it would violate a zoning ordinance and cause irreparable injury to the property of the individual owners and on the ground that a permit had not been obtained from the city building inspector, the trial judge held the zoning ordinance of the city void, but continued the restraining order to the final hearing because of failure to obtain the building permit: *Held,* the plaintiffs' exception to the holding that the ordinance was void preserves their rights, certainly to the final hearing, and the trial court, in view of the reasons assigned for continuing the injunction, was not required to pass upon the validity of the zoning ordinance, and his judgment therein will be disregarded for the time being.

2. **Appeal and Error A e—Courts will not anticipate question of constitutional law.**

   The courts will not anticipate a question of constitutional law in advance of the necessity of deciding it.

3. **Pleadings D d—By answering to merits defendant waives right to demur for misjoinder of parties and causes.**

   By answering to the merits of an action a defendant waives his right to demur to the complaint for misjoinder of parties and causes of action.

4. **Municipal Corporations H e—Held: plaintiffs had right to maintain action to restrain violation of zoning ordinance.**

   Where individual property owners and a city seek injunctive relief against the erection and maintenance of a gasoline filling station within a zoning district within the city, the individual plaintiffs alleging permanent and irreparable injury to their property, a demurrer on the grounds that authority to bring the suit had not been shown by the individual or corporate plaintiffs is bad, the allegations of the complaint of the individual plaintiffs being sufficient as to them, and the municipality having the statutory right given it. Section 8, chapter 250, Public Laws of 1923.

APPEALS by plaintiffs and defendants from *Grady, J.,* at Chambers, Clinton, N. C., 22 December, 1930. From WAYNE.

Civil action to restrain the defendants from completing a gasoline filling or gasoline storage station, without obtaining permit from building inspector, and from operating same in violation of a zoning ordinance, adopted pursuant to chapter 250, Public Laws 1923. The two individuals join as parties plaintiff and allege that their property in the immediate vicinity will be irreparably damaged by the completion and operation of the filling station in question.

The defendants answered, set up a number of defenses, and thereafter demurred on the ground (1) of a misjoinder of parties and causes of action; (2) for that "said complaint fails to show any authority of the individual plaintiffs to maintain this action"; and (3) because "said complaint fails to show any authority on the part of the city of Goldsboro to maintain this action."

The trial court overruled the demurrer, held the zoning ordinance to be void, but continued the restraining order to the hearing on the ground that the defendants had failed to obtain a permit from the building inspector. From this judgment both sides appeal.

Dickinson & Freeman, D. C. Humphrey and J. Faison Thomson for plaintiffs.

Kenneth C. Royall and Andrew C. McIntosh for defendants.

PLAINTIFFS' APPEAL.

STACY, C. J. The plaintiffs appeal from the holding of the court that the zoning ordinance is void. *Non constat* the judgment is in their favor. The rights of the plaintiffs, therefore, are amply protected and preserved, certainly until the final judgment, by their exception duly entered. *Gray v. James,* 147 N. C., 139, 60 S. E., 906; *Alexander v. Alexander,* 120 N. C., 472, 27 S. E., 121.

The trial court, in view of the reasons assigned for continuing the injunction, was not required to pass upon the validity of the zoning ordinance, hence this part of the judgment may be stricken out and disregarded for the time being. "The courts never anticipate a question of constitutional law in advance of the necessity of deciding it." *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481. We express no opinion, on the present record, as to the validity of said ordinance.

As thus modified, the judgment on plaintiffs' appeal will be affirmed.

Modified and affirmed.

DEFENDANTS' APPEAL.

STACY, C. J. The defendants appeal from the overruling of their demurrer and from the judgment continuing the restraining order to the final hearing.

The defendants waived their right to demur on the ground of a misjoinder of parties and causes of action by answering to the merits. C. S., 518; *Moseley v. Johnson,* 144 N. C., 257, 56 S. E., 922; *Ransom v. McClees,* 64 N. C., 17. "A defendant cannot demur and answer at the same time. By answering to the merits all defects are waived, except an objection to the jurisdiction of the court or to the defectiveness of the cause of action, which objection can be made at any stage of the case." *Walker, J.,* in *Rosenbacher v. Martin,* 170 N. C., 236, 86 S. E., 785.

The demurrer was properly overruled on the second and third grounds, to wit, that the complaint fails to show any authority on the part of the individual plaintiffs or the city of Goldsboro to maintain the instant action. *Merrimon v. Paving Co.,* 142 N. C., 539, 55 S. E., 366. The individual plaintiffs allege threatened injury to their property of an irreparable nature (*Wentz v. Land Co.,* 193 N. C., 32, 135 S. E., 480), and the city of Goldsboro is expressly authorized to maintain an action, such as the present, by section 8, chapter 250, Public Laws 1923. *Elizabeth City v. Aydlett, ante,* 58.

The remaining exceptions require no special mention. Let the costs be divided.

Affirmed.

R. A. ADAMS AND WIFE, CARRIE ADAMS, v. J. A. WOODIE.

(Filed 25 February, 1931.)

1. Reference A a—Before making final report referee may reopen case upon proper notice to parties.

A referee has power to reopen a case still pending before him without final report made by him, with proper notice given the parties, and to permit the plaintiff to offer additional evidence, and when the evidence is then sufficient, his award in the plaintiff's favor sustained by the trial court will be sustained by the Supreme Court on appeal.

2. Same—Under facts in this case held: defendant was not prejudiced by shortness of referee's notice of reopening the case.

Conceding in this case that the referee should have given ten days notice to the defendant of his intention to reopen the case before him, his exception only to the power of the referee to reopening the case is insufficient to show he was prejudiced on that account, and the judgment rendered adverse to him by the lower court will stand on appeal.

CIVIL ACTION, before *Harding, J.,* at March Term, 1930, of WATAUGA.

Plaintiffs instituted an action for damages against the defendant for trespass in entering upon the lands of plaintiffs and cutting and removing timber therefrom. The land in dispute was about six acres. The defendant denied the trespass and cutting of timber upon any land owned by the plaintiffs. The judge of the Superior Court referred the matter to a referee to find the facts and state his conclusions of law. The referee heard evidence on 11 January, 1930, and the plaintiffs offered evidence to sustain the allegations in the complaint. At the conclusion of the evidence the defendant made a motion for nonsuit, which was overruled. Thereafter, on 20 January, 1930, the referee made an order to reopen the case and take further evidence on 24 January, 1930. This notice was mailed by the referee to the attorneys for the defendant four days prior to the hearing. When the hearing was resumed on 24 January, 1930, the attorneys for defendant made a special appearance and moved "to strike out the order allowing plaintiffs to introduce further testimony in the cause on the grounds that the same is inequitable, contrary to good practice, contrary to law, and not within the discretion of the referee." The motion was overruled and the plaintiff offered further evidence. The referee filed a report finding as a fact that the plaintiffs had been in continuous possession of the land in dispute for thirty years or more, and that said plaintiffs had been damaged by the defendant in the sum of $200. Exceptions were filed by the defendant and the matter was thereafter heard by Harding, J., who confirmed the report of the referee, and the defendant appealed.

Trivette & Holshouser for plaintiffs.
Bingham, Linney & Bingham and W. R. Lovill for defendant.

PER CURIAM. At the second hearing before the referee the plaintiffs "mended their lick" and offered sufficient evidence of possession of the premises in controversy to support the finding of fact by the referee. *Bryan v. Spivey,* 109 N. C., 57, 13 S. E., 766; *Berry v. McPherson,* 153 N. C., 4, 68 S. E., 892.

At the time the referee reopened the hearing no final report had been made and the entire matter was pending before the referee. Four days notice of reopening the case was given by the referee instead of ten days. And even if it be conceded that, under the circumstances, ten days notice should have been given, notwithstanding it does not appear that the defendant has suffered any harm by reason thereof, because the defendant made no motion before the referee to the effect that he did not have full opportunity to present any evidence which he deemed pertinent, nor did he make any complaint in the Superior Court upon the hearing before the trial judge that he had been deprived of an opportunity to fully present his cause and the evidence to sustain it.

Hence the Court is persuaded that the judgment rendered should stand. *Coleman v. McCullough,* 190 N. C., 590, 130 S. E., 508.

Affirmed.

LUMMUS COTTON GIN COMPANY v. ANDREW WISE.

(Filed 25 February, 1931.)

1. **Evidence C d—Burden of proving matters set up in counterclaim is on the defendant.**

   In an action upon a purchase-money note a counterclaim based upon damages for breach of warranty of the thing sold is a cross-action with the burden of proof on the defendant setting it up.

2. **Trial D a—Where there is evidence to support allegations in answer setting up counterclaim, nonsuit is properly denied.**

   Where there is evidence to support defendant's counterclaim set up by him in his answer to the complaint the plaintiff's motion to dismiss the cross-action thereon is properly denied.

3. **Sales H e—Under facts of this case purchaser held not barred from recovery on warranty because of failure to comply with condition.**

   Where a written warranty of sale of machinery is based upon a condition precedent, and it appears that the purchaser could not read or write, and that the warranty was not read to him by the seller's agent, the nonperformance of the condition is held not to bar his right of recovery on the warranty in this case.

APPEAL by plaintiff from *Devin, J.,* at September Term, 1930, of JOHNSTON. No error.

This is an action to recover on a note for the sum of $845.70, executed by the defendant, in part payment of the purchase price for a cotton gin. In his answer defendant admitted the execution of the note, and also the execution of the conditional sales contract, by which the plaintiff retained title to the cotton gin, until all the notes for the purchase price of said cotton gin had been paid. All of said notes except the note sued on in this action have been paid.

Defendant alleged in his answer that plaintiff failed to perform fully its contract in the particulars specified in the answer, and also breached its warranty in the sale of the cotton gin. He demanded judgment that he recover of the plaintiff damages as a counterclaim or set-off against the note sued on in this action.

The jury found that there was a breach of the warranty as alleged in the answer and assessed defendant's damages at $600. From judgment on the verdict that plaintiff recover of the defendant the sum of $245.40, with interest from the date of the note, to wit, 25 June, 1925, plaintiff appealed to the Supreme Court.

A. M. Noble for plaintiff.
Abell & Shepard for defendant.

PER CURIAM. On the admissions in the answer, but for the counterclaim alleged therein, the plaintiff was entitled to judgment on the pleadings. The burden of proof was therefore on the defendant, as the trial judge correctly ruled.

A counterclaim is a cross-action by the defendant against the plaintiff. The burden of proof is always on the defendant, who admits the cause of action alleged in the complaint, and relies upon a counterclaim alleged in his answer, which is denied in the reply. In the absence of evidence tending to support the counterclaim, the defendant should be nonsuited. *McQueen v. Bank,* 111 N. C., 509, 16 S. E., 207.

In the instant case there was evidence in support of the allegations in the answer, constituting a counterclaim. There was, therefore, no error in the refusal of plaintiff's motion at the close of all the evidence that defendant's counterclaim or cross-action be dismissed.

Upon consideration of the other assignments of error by plaintiff on this appeal, we are of the opinion that they cannot be sustained. Defendant can neither read nor write. The warranty contained in the written contract was not read or explained to him by the salesman who solicited his order for the cotton gin. Under the circumstances as shown by all the evidence, and as found by the jury, the conditions precedent to a claim by the defendant for damages resulting from a breach of the warranty cannot and ought not to be enforced in the instant case. The judgment is affirmed. We find

No error.

CECELIA CAPEHART BELL v. MOSES B. GILLAM, EXECUTOR, ET AL.

(Filed 4 March, 1931.)

1. **Wills E b—Devise held to create life estate subject to use of another on condition that it be converted into fee upon termination of use.**

   A devise of lands "(a) to the children of my son I give, subject to the reservation hereinafter named, the following lands . . . (b) the said children to hold these lands during their life, subject to a reservation hereinafter named, and on their death shall go to their children, etc. . . . (c) the said children shall hold these lands as shall their children, subject to the right of my son to the use of the lands cultivatable for his personal use so long as he shall live, . . . but in the event the title to the use shall in any way pass out of his hands, immediately the fee shall vest in his children": *Held*, to create a life estate to the children of the son, subject to his right to use all the land capable of cultivation so long as he shall live, on condition that the children's life estate shall be converted into a fee simple upon the title to the use passing out of the hands of the son.

2. **Wills E a—General rules for construction of wills.**

   In construing wills the courts will endeavor to ascertain the intent of the testator as expressed in the words used, and in cases of doubt resort may be had to the usual canons of interpretation, and a devise will be construed to be in fee unless it appears from the will that the testator intended to convey an estate of less dignity, C. S., 4162.

3. **Judgments M b—Judgment is conclusive upon all persons whose interests, contingent or vested, are represented.**

   Where lands have been devised upon certain limitations, some of which are affected with contingent interest, and the judgment of the court recites all parties and interest were before it, it will be conclusive of any interest embraced by the judgment.

4. **Wills E d—In this case held: estate in remainder vested in fee in the granddaughter of the testator.**

   Where a will devises a remainder to a class the remainder vests in right, but not in amount or quantity, in such of the class as are *in esse* before the termination of the particular estate, and where the particular estate is determined by the happening of an event other than the death of the tenant of the particular estate, the fee immediately vests in those of the class *in esse* at the time of the termination of the particular estate, and in this case the granddaughter of the testator takes the remainder in fee without awaiting the death of her father, the tenant of the particular estate.

APPEAL by defendants from *Sinclair, J.*, at November Term, 1930. of BERTIE. Affirmed.

Celia H. Etheridge, the plaintiff's grandmother, died leaving a will, the second and sixth items of which are as follows:

"2. To the children of my son Holley M. Bell, I give, subject to the reservation hereinafter named, the following part of the Eden House Farm, all that land which is now being cultivated under his direction and which lies to the left-hand side of the farm road as you go to the house, from this land is excepted 12 acres lying in front of the house which is now cultivated under the direction of Jno. C. Bell. The children of said Holley M. Bell are to have a one-half interest in and to the woodlands, which are to be divided between them and the children of Jno. C. Bell by three disinterested persons some of whom I may hereinafter name.

"The children of said Holley M. Bell are to hold these lands during their life, subject to a reservation hereinafter named, and on their death same shall go to their children, and from them to their lawful heirs forever and ever and ever.

"The said children of Holley M. Bell shall hold these lands, as shall their children and heirs, subject to the right of Holley M. Bell to use all of the lands cultivatable for his personable use, so long as he shall live and he shall in no sense be liable to them for any rents in any sense, but in event the title to the use shall in any way pass out of the hands of Holley M. Bell, immediately the fee shall vest in his children. Said Holley M. Bell shall have the right to have cut the timber on said lands and may sell the same, holding the funds for his said children, but having the full use of same, and if necessary he is to be permitted to use the principal of same, without a full accounting for same."

"6. In event either Holley M. Bell or Jno. C. Bell should die without children, then in that event the children of the other shall take title to the lands on the same terms hereinbefore set forth."

Holley M. Bell and Jno. C. Bell are brothers, the latter being guardian *ad litem* of his children and the former guardian *ad litem* of all persons not *in esse* who might have any interest or claim to the lands described in the complaint. At the hearing all parties in interest were present in person or by attorney, having duly filed their answers to the complaint, and it was adjudged that the plaintiff, Cecelia Capehart Bell, is the absolute owner in fee simple and entitled to the exclusive possession of all and singular the land devised to her by the will of her grandmother, Celia H. Etheridge, and therein described as 'the following part of the Eden House Farm: All that land which is now being cultivated under his (Holley M. Bell's) direction and which lies to the left-hand side of the farm road as you go to the house; from this land is excepted 12 acres lying in front of the house which is now cultivated under the direction of John C. Bell," the lands herein referred to and hereby adjudged and decreed to belong to the plaintiff, Cecelia Capehart Bell, being the same described and referred to in the second section of the complaint in this action, including the woodsland therein mentioned, and being also the same land described in the judgment rendered in favor of the plaintiff at November Term, 1929, by his Honor, Walter D. Small, judge presiding, in the suit of said Cecelia Bell, by her next friend, W. B. Gurley, against Peoples Bank and Trust Company and Bank of Colerain, which is also referred to for description. The plaintiff is again declared and decreed to be the absolute owner in fee simple of all and singular the said lands so described and devised to her as aforesaid, and the will of her grandmother, Celia H. Etheridge, is construed accordingly."

The defendants excepted and appealed.

J. A. Pritchett for appellants.
MacLean & Rodman for appellee.

ADAMS, J. The plaintiff is the only child of Holley M. Bell. She brought suit asking that she be judicially declared the sole owner in fee of certain real estate devised by her grandmother, Celia H. Etheridge, to the children of Holley M. Bell. The material parts of the devise are as follows: (a) "To the children of my son Holley M. Bell, I give, subject to the reservation hereinafter named, the following part of the Eden House Farm" . . . (b) "The children of said Holley M. Bell are to hold these lands during their life, subject to a reservation hereinafter named, and on their death shall go to their children and from them to their lawful heirs forever and ever and ever." . . . (c) "The said children of Holley M. Bell shall hold these lands as shall their children and heirs, subject to the right of Holley M. Bell, to use all of the lands cultivatable for his personal use so long as he shall live . . . but in the event the title to the use shall in any way pass out of the hands of Holley M. Bell, immediately the fee shall vest in his children."

In contemplation of law what is the effect of this language? In construing wills the courts endeavor to ascertain the intention of the testator as expressed by the words he has used. If a devise is set forth in clear and unambiguous language there is no occasion for construction; but if doubt exists resort may be had to the usual canons of interpretation, by which the meaning of words, phrases, clauses, and even of apparent repugnancies may be explained by reference to other parts of the will. *Williams v. Best,* 195 N. C., 324; *Scales v. Barringer,* 192 N. C., 94.

A devise of land is held and construed to be in fee unless it appears from the will that the testator intended to convey an estate of less dignity. C. S., 4162. The first of the foregoing clauses (a), standing alone, is a devise in fee, subject to the reservation; the second (b), a devise to the children of Holley M. Bell for life, with remainder to their children, subject to the reservation; and the third (c), a contingent devise of the fee to the children.

The quoted provisions taken together are at least susceptible of the interpretation that the devise in question gives a life estate to the children of Holley M. Bell, subject to his right to use all the land capable of cultivation so long as he shall live, on condition that the children's life estate shall be converted into a vested fee simple the moment the title to the use shall pass out of the hands of Holley M. Bell.

Has the title to the use passed from his hands? The answer may be found in a judgment of the Superior Court of Bertie County rendered at the November Term of 1929, in which it was adjudged that the plaintiff is the owner in fee of the land in controversy, discharged of Holley M. Bell's right to use it as provided in the will. The judgment contains a recital that all parties in interest were before the court, and presumably all interests were protected whether vested or contingent. The entire record of the case in which this judgment was rendered is not before us; but the reasonable conclusion is that by virtue of the condition heretofore named the "title to the use" passed from Holley M. Bell and the title in fee to the land immediately vested in his children.

The devise is to a class—"the children of my son Holley M. Bell." The plaintiff, his only child, represented the class. A remainder to a class of children vests in right, but not in amount or quantity, in such of the objects of the bounty as are *in esse* and answer the description at any time before the determination of the particular estate. *Lumber Co. v. Herrington,* 183 N. C., 85. But when the particular estate comes to an end all of the class who have an interest are immediately determined. *Trust Co. v. Stevenson,* 196 N. C., 29; *Jarman v. Day,* 179 N. C., 318; *Cooley v. Lee,* 170 N. C., 18.

It will be seen that the interest of the plaintiff is declared by the judgment under the express terms of the will, without the necessity of awaiting the death of Holley M. Bell, because his right to the use of the land was extinguished and the fee vested immediately upon the happening of the contingency. The case of *Fulton v. Waddell,* 191 N. C., 688, on which the defendants rely, is not controlling, as pointed out in the concurring opinion of *Brogden, J.,* in *Trust Company v. Stevenson, supra.* Judgment

Affirmed.

RALEIGH BANKING & TRUST COMPANY v. SAFETY TRANSIT LINES, INCORPORATED.

(Filed 4 March, 1931.)

1. **Corporations H c—Claim for breach of lease contract held provable against receiver as unsecured claim.**

   Where a claim for damages has been filed with the receivers of a transit bus line for damages for a breach of contract as lessee of a union bus station in a city which was disallowed on the grounds that the lease was invalid, approved by the Superior Court judge, but reversed by the Supreme Court on appeal, holding the lease was valid and remanding the case for definite findings as to whether the lease had been breached: *Held,* on the second appeal upon the further findings that the lease had been broken by the insolvent corporation the claim is provable as an unsecured debt.

2. **Parties B b—Motion that proper party be joined as defendant is addressed to discretion of the trial court.**

   The purchaser of a lease at the receiver's sale of an insolvent corporation is not a necessary party to enforce a claim filed with the receiver for damages for the breach of the lease contract by the insolvent corporation or its receiver, and the refusal of a motion to make such purchaser a party to the proceedings is not error, C. S., 460, if such purchaser is a proper party the motion is addressed to the sound discretion of the trial court and not reviewable on appeal.

3. **Jury C b—Waiver of jury trial at beginning of action applies to further proceedings after remand for finding of further facts.**

   Where claims against an insolvent corporation are filed with its receiver, and the parties waive their right to a trial by jury, and on appeal the cause is remanded for further findings of fact, the receiver, having waived its right, may not successfully insist upon a trial by jury on the second hearing.

4. **Corporations H c—Claim for damages for breach of lease contract, filed after the date of the breach, is not premature.**

   A cause of action for damages for the breach of a lease contract accrues from the date of the breach, and where a claim against a receiver, for breach of a lease contract by the insolvent corporation or the receiver is not filed until after the alleged breach, the receiver may not maintain that the claim was premature.

5. **Landlord and Tenant G b—Measure of damages for breach of lease contract.**

   In this case *held:* measure of damages for breach of a lease contract were correctly assessed in accordance with *Monger v. Lutterloh,* 195 N. C., 274, and appellant's contention that the damages assessed were excessive cannot be sustained.

APPEAL by the receivers of the defendant, Safety Transit Lines, Inc., from *Daniels, J.,* at June Term, 1930, of WAKE. Affirmed.

This is an action for the appointment of receivers for the defendant, Safety Transit Lines, Inc., an insolvent corporation, and for other relief.

After the receivers were appointed, and while they were engaged in the performance of their duties, under the orders of the court, W. A. Royal and Graves J. Smith, trustees, filed with said receivers a claim for damages resulting from a breach by the defendant, its receivers or assigns, of a lease for a bus station located in Goldsboro, N. C., executed by the claimant, W. A. Royal, and assigned by him to Graves J. Smith, trustee.

This claim was considered by the receivers, and disallowed. Subsequently, at October Special Term, 1929, of the Superior Court of Wake County, the claim was heard by Harris, J. From judgment affirming the order of the-receivers, and disallowing the claim, the claimants appealed to the Supreme Court.

Upon the hearing of said appeal at the Spring Term, 1930, of the Supreme Court, the assignments of error by appellants were sustained, 198 N. C., 675, 153 S. E., 158. The cause, however, was remanded to the Superior Court "in order that it may be specifically and definitely determined whether there was a breach of the lease by the Safety Lines, Inc., or its receivers, or the purchaser of the lease at the receivers' sale."

The cause was thereafter heard at June Term, 1930, of the Superior Court of Wake County. At this hearing, in accordance with the direction of the Supreme Court, the court found, from the evidence offered at the hearing:

"1. That there was no breach of the lease either by the Safety Transit Lines, Inc., or by the receivers thereof, prior to August, 1929;

2. That the lease agreement was broken by W. Bond Collins and his assignee, Safety Transit Company, both by its positive repudiation of the lease, and the denial of liability thereunder, early in August, 1929, and also by its abandonment of the property and failure to pay rent after 31 December, 1929;

3. The assignment of the lease did not release the Safety Transit Lines, Inc., and its receivers from liability thereunder, regardless of whether W. Bond Collins and his assignee, Safety Transit Company, assumed the obligations of the lease. Therefore, the receivers are liable to the claimants for damages sustained by the breach of the lease;

4. In accordance with the opinion of the Supreme Court, the claim of W. A. Royal and Graves J. Smith, trustee, against the receivers is allowed in the sum of $13,622.29, being the present cash value of the loss sustained."

From judgment allowing the claim of W. A. Royal and Graves J. Smith, trustee, for the sum of $13,622.29, and directing the receivers of the defendant, Safety Transit Lines, Inc., to pay dividends to the claimant on said claim, the receivers appealed to the Supreme Court.

J. N. Smith and Kenneth C. Royall for claimants.
Wm. B. Jones and Clyde A. Douglass for receivers.

CONNOR, J. On the former appeal in this cause, we were of opinion, and so held, that on the facts found by Judge Harris, the lease executed by the claimant, W. A. Royal, to the Safety Transit Lines, Inc., and others, for the bus station at Goldsboro, N. C., was valid, and that the defendant, Safety Transit Lines, Inc., at least, was liable by the terms of said lease, to the claimants in damages, if, as alleged by the claimants, there was a breach of the lease by the Safety Transit Lines, Inc., resulting in damages. We therefore sustained the assignments of error on said appeal based on exceptions by the appellants to the holding by Judge Harris that the lease was not valid, and that for that reason the claim of the claimants should be disallowed. The findings of fact made by Judge Harris, as to whether or not there was a breach of the lease by the Safety Transit Lines, Inc., were inconsistent and conflicting. Indeed, on his holding that the lease was invalid, and not binding on the Safety Transit Lines, Inc., it was immaterial whether or not there had been a breach of the lease. We were unable to determine on the record then before us, whether the judgment, from which the claimants had appealed, should be affirmed or reversed. If there had been a clear and unequivocal finding of fact as to this phase of the controversy, we would have affirmed, or reversed the judgment. If there had been a finding of fact, supported by competent evidence, that there had been no breach, we would have affirmed the judgment, on that ground. In the absence of such finding, we were of the opinion that the cause should be remanded to the Superior Court, "in order that it may be specifically and definitely determined whether there has been a breach of the lease by the Safety Transit Lines, Inc., or its receivers, or the purchaser of the lease at the receivers' sale." The cause was remanded in accordance with this opinion, and in accordance with our well-settled practice in such cases. *Fulenwider v. Rendleman,* 196 N. C., 251, 145 S. E., 722; *Gulf Refining Co. v. McKernan,* 178 N. C., 82, 100 S. E., 121; *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623; *Smith v. Smith,* 108 N. C., 365, 12 S. E., 1045; *Knott v. Taylor,* 96 N. C., 553, 2 S. E., 680.

At the hearing of this cause by Judge Daniels, the receivers moved that the Safety Transit Company, the purchaser of the lease at the sale by the receivers of the assets of the defendant, be made a party defendant. There was no error in the refusal of the court to allow this motion. A complete determination of the matters involved in the proceedings to enforce the claim against the receivers did not require the presence of the Safety Transit Company as a party defendant. This company was, therefore, not a necessary party, within the meaning of C. S., 460. At most the Safety Transit Company was only a proper party. The motion was therefore addressed to the discretion of the court. Its action on the motion is not reviewable. *Guthrie v. Durham,* 168 N. C., 573, 84 S. E., 859. Indeed, it may be doubted whether in a proceeding to enforce a claim against the receiver of an insolvent corporation, one claiming under the receiver, is even a proper party, on the contention that such party is secondarily liable to the claimant. This cause is not an action to recover damages for breach of a lease contract, but a proceeding to enforce a claim in a receivership.

The receivers further moved for a trial by jury of the issues involved in the claim filed with them by the claimants. At the hearing before Judge Harris, a trial by jury was expressly waived by both the receivers and the claimants, who both agreed that the judge should hear the evidence and pass upon the claim. The hearing by Judge Daniels was a continuation of the hearing by Judge Harris. The facts found by Judge Harris and set out in his judgment have not been disturbed. The hearing by Judge Daniels was for the purpose of finding additional facts, in accordance with the direction of this Court. The waiver of a jury trial at the first hearing continued in force until the final determination of all matters involved in the proceeding. There was no error in the refusal of the motion for trial by jury.

The receivers excepted to the judgment rendered by Judge Daniels, and on their appeal to this Court contend that there was error in said judgment for that the claim for damages resulting from the breach of the lease, was premature, and that the damages assessed are excessive in amount. Neither of these contentions can be sustained. The cause of action arose at the date of the breach, which was prior to the date of the filing of the claim. The damages were assessed in accordance with the rule approved in *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12, and suggested as the proper rule in the instant case by *Brogden, J.,* in his opinion on the former appeal in this cause. See 35 C. J., Art. Landlord and Tenant, sec. 502. We find no error. The judgment is

Affirmed.

C. L. WILLIAMS, SOLICITOR OF THE FOURTH JUDICIAL DISTRICT, v. JOHN B. HOOKS, WILLIAM BORDEN HOOKS, AND LUCINDA T. HOOKS, EXECUTORS OF J. B. HOOKS, DECEASED; C. R. AYCOCK, CLERK OF THE SUPERIOR COURT OF WAYNE COUNTY; EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 4 March, 1931.)

1. **Parties B b—Motion for joinder of proper parties is addressed to discretion of court and is not reviewable.**

The action of the trial judge in making necessary parties to an action is reviewable on appeal, and the making of proper parties is addressed to his sound discretion and not reviewable. C. S., 456, 460.

2. **Same — Appellants in this case held neither necessary nor proper parties and order making them parties was erroneous.**

Where the deceased clerk of the Superior Court has commingled his personal and official funds and invested them as the law requires for the latter, and the suit is only for the appointment of a receiver to separate the investments which are amply sufficient to cover his official accounts, the sureties on the bonds of the deceased clerk are neither necessary nor proper parties to the action, and an order of the trial court in making them parties over their objection is error.

STACY, C. J., not sitting; CLARKSON, J., dissents.

APPEAL by the defendants, Employers Liability Assurance Corporation, Ltd., and United States Fidelity and Guaranty Company, from *Johnson, Special Judge,* at August Term, 1930, of WAYNE. Reversed.

This is an action for the appointment of a receiver, with power to take over, hold and liquidate, under the orders of the court, certain securities and investments in the hands of J. B. Hooks, deceased, at the date of his death.

At the date of his death, and for several years prior thereto, J. B. Hooks was the clerk of the Superior Court of Wayne County, North Carolina; as such clerk, the said J. B. Hooks had received, from time to time, various sums of money, which he held by virtue of his office. Some of these sums of money, the said J. B. Hooks had invested in various income-bearing securities, as he was required by law to do.

During his terms of office as clerk of the Superior Court, the said J. B. Hooks had in hand, from time to time, various sums of money which belonged to him, personally. These sums of money were also invested by the said J. B. Hooks in various securities.

The said J. B. Hooks commingled the funds in his hands, as clerk of the Superior Court, with the funds which belonged to him personally, and invested said commingled funds in securities, which he had on hand at his death on 28 November, 1929. The face value of said securities largely exceeded the amount of the funds in the hands of the said J. B. Hooks, deceased, by virtue of his office as clerk of the Superior Court, at the date of his death, as shown by an audit made under the orders of the board of commissioners of Wayne County.

It is impossible, or at least impracticable, now to ascertain which of the securities in the hands of J. B. Hooks, at the date of his death, should be turned over and delivered to the defendant, C. R. Aycock, his successor as clerk of the Superior Court of Wayne County, and which of said securities should be held and retained by the defendants, his executors, as assets belonging to his estate. All of said securities were held by the said J. B. Hooks for the protection of the beneficiaries of the funds in his hands as clerk of the Superior Court of Wayne County, and an accounting will be necessary before it can be ascertained which of said securities are assets of his estate to be held and retained by his executors.

A receiver has been appointed in this action, by consent of the plaintiff, the Solicitor of the Judicial District, which includes Wayne County, and the defendants, C. R. Aycock, the successor of J. B. Hooks, as clerk of the Superior Court of Wayne County, and the executors of the said J. B. Hooks, deceased. This receiver is authorized by the court to take over, hold, and liquidate, under its order, all the securities and investments in the hands of J. B. Hooks, at the date of his death.

The defendants, Employers Liability Assurance Corporation, Ltd., and United States Fidelity and Guaranty Company, are sureties on bonds filed by J. B. Hooks, as clerk of the Superior Court. No cause of action is alleged in the complaint against either of these defendants, nor is any relief demanded therein of either of them. They were made parties defendant to the action in order that they might have notice of all orders made by the court, during the receivership, and might have the right to be heard before said orders were made.

The action was heard at August Term, 1930, of the Superior Court of Wayne County on the motion of the two last named defendants, that the action be dismissed as to them and as to each of them.

From judgment denying their said motion, the said defendants appealed to the Supreme Court.

Kenneth C. Royall and Andrew C. McIntosh for receiver.
Langston, Allen & Taylor for appellants.

CONNOR, J. This is not an action on either of the official bonds executed by J. B. Hooks, clerk of the Superior Court of Wayne County, as principal, and the appellants, respectively, as surety. Neither the board of commissioners of Wayne County, the obligee in the bond executed by the defendant, Employers Liability Assurance Corporation, Ltd., as surety, nor the State of North Carolina, the obligee in the bond executed by the defendant, United States Fidelity and Guaranty Company, as surety, is a party to the action. Nor is any beneficiary of either of said bonds a party to the action. The action is equitable in its nature, and is for the preservation of the securities in the hands of J. B. Hooks, as clerk of the Superior Court of Wayne County, at his death, in order that the rights and equities of his successor and of his executors, respectively, may be ascertained and adjusted, under the supervision and orders of the court.

Neither of the appellants has or claims an interest in the securities which are the subject-matter of the action; nor is either a necessary party to a complete determination of the questions involved in the action. Neither of the appellants is, therefore, a necessary party to the action. C. S., 456, and C. S., 460.

Nor can it be held that either of the appellants is a proper party to the action. They have no interest, present or future, and no title, legal or equitable, in or to the securities which are the subject-matter of the action. They cannot be retained, over their objection, as parties defendant for the sole purpose of binding them by orders to be made from time to time, in the action. It is not alleged in the complaint or found by the court that the securities in the hands of the receiver are not sufficient, in value, to pay the amount due by J. B. Hooks, deceased, to the defendant, C. R. Aycock, his successor as clerk of the Superior Court of Wayne County. C. S., 943.

As appellants are not proper parties to the action, the judgment retaining them as defendants is reviewable by this Court on their appeal from the judgment. If they were proper parties, the motion to dismiss the action as to them would have been addressed to the discretion of the court, and the judgment or order denying the motion would not have been reviewable. *Guthrie v. Durham,* 168 N. C., 573, 84 S. E., 859.

There was error of law in the refusal of the court to allow the motion of the appellants that the action be dismissed as to them, and as to each of them, for the reason that they are neither necessary nor proper parties to the action. The judgment is

Reversed.

STACY, C. J., not sitting.

CLARKSON, J., dissents.

THE CORPORATION COMMISSION OF NORTH CAROLINA v. BANK OF VANCEBORO.

(Filed 4 March, 1931.)

1. **Banks and Banking H a—Procedure for enforcement of statutory liability of stockholders prior to chapter 113, Public Laws of 1927, held valid.**

   Prior to the enactment of chapter 113, Public Laws of 1927, the procedure, under the statutory provisions for the enforcement of the statutory liability of shareholders of an insolvent bank in a receiver's hands, was by order of court based upon the report of the receiver to the shareholders to show cause why the assessment made against them should not be enforced, the original assessments not being final or conclusive, but only preliminary to the order that the shareholders be made parties to the action, giving them the right to set up any defense in law or fact, and where this procedure has been followed and stockholders appear and answer to the merits the position is not available to them that they were not parties to the action at the time the assessment was made.

2. **Appearance A a—An answer to the merits of a cause is a general appearance.**

   Where the shareholders in an insolvent bank appear in reply to a motion to show cause why a preliminary assessment of their statutory liability should not be made against them, and by motion, challenge the validity of the order making the assessments, and not solely for the purpose of challenging the jurisdiction of the court, their motion is a general appearance, though upon its face it is called a special appearance.

Appeal by certain stockholders of the defendant, Bank of Vanceboro, from *Small, J.*, at November Term, 1930, of Craven. Affirmed.

This is an action by the Corporation Commission of North Carolina for the appointment of a receiver of the Bank of Vanceboro, an insolvent banking corporation, organized under the laws of this State, for the liquidation of the assets of said corporation, and for the distribution of the proceeds of said liquidation among its creditors. The action was begun on 31 January, 1924, and is now pending in the Superior Court of Craven County.

On 14 May, 1925, the permanent receiver of the Bank of Vanceboro filed in this action a report showing his receipts and disbursements to the date of said report. On the facts shown by said report, and by the audit filed in the office of the clerk of said court, the receiver recommended that an assessment be made on each of the stockholders of the Bank of Vanceboro, on account of his statutory liability, for the full amount of the par value of his stock.

At November Term, 1925, on the facts shown by the report of the receiver, assessments were made on the stockholders of record, in accordance with the recommendation of the receiver. In the order making the assessments, the clerk of the court was directed to notify each of said stockholders that the assessment had been made on him, and that he was required to show cause at the next term of the court why judgment should not be rendered against him on his assessment.

Thereafter certain persons, whose names appear on the records of the Bank of Vanceboro, as stockholders, at the date of the adjudication of said bank as insolvent, filed in this action a paper-writing, signed by their attorneys, which purports to be a special appearance. On such appearance, attorneys for said persons moved that the assessments against them be vacated and set aside, on the ground that they were not parties to the action at the time the order making the assessments was made.

The motion was continued from time to time and was finally heard at November Term, 1930, by Judge Small.

From judgment denying the motion and adjudging that said persons having entered a general appearance in the action, are now parties thereto, and are required to file answers to the petition of the receiver within thirty days, setting up such defenses to the assessments as they may be advised will avail them, the said persons appealed to the Supreme Court.

H. P. Whitehurst and Ward & Ward for the receiver.
Guion & Guion and Moore & Dunn for appellants.

CONNOR, J. The procedure in the instant case was in substantial compliance with statutes in force at the date of the commencement of the action, providing for the enforcement of the statutory liability of stockholders of banking corporations. In *Smathers v. Bank,* 135 N. C., 410, 47 S. E., 893, it is said:

"In winding up the affairs of an insolvent corporation it is best that, as nearly as may be, the court having original jurisdiction bring all the parties interested in the final decree before it, to the end that their rights and equities may be adjusted and administered. The usual and better practice is to have an assessment upon the stockholders made by the court, upon an ascertainment from the report of the receiver, and notice issued to each stockholder to show cause why such assessment should not be enforced." This procedure was approved in *Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752. The original assessments are not final or conclusive on the stockholders; they are made on the facts shown by the report of the receiver, and are only preliminary to the order that the stockholders of record be made parties to the action. When so made, each stockholder has the right to file his answer, and set up any defense, in law or in fact, to the assessment, which he may be advised will avail him. No final judgment against the stockholder can be rendered until he has become a party to the action, with full opportunity to be heard. *Corp. Com. v. Bank,* 192 N. C., 366, 135 S. E., 48. In the instant case, the judgment directs that each of the appellants shall have opportunity to file an answer, and thereby raises issues, either of law or of fact, which must be determined before any assessment can be enforced against him. There is no error in the judgment. *Corp. Com. v. Bank,* 193 N. C., 113, 136 S. E., 362.

The statutes providing the procedure for the enforcement of the statutory liability of stockholders of a banking corporation, applicable in the instant case, have been superseded by chapter 113, Public Laws 1927. See N. C. Code of 1927, section 218(c), subsection 13. The validity of this statute was sustained by this Court in *Corp. Com. v. Murphey,* 197 N. C., 42, 147 S. E., 667. On appeal to the Supreme Court of the United States, the judgment of this Court was affirmed. 74 L. Ed., 598.

There is no error in the holding of Judge Small that applicants are now, by virtue of the appearance in the action, parties thereto. Appellants' contention that their appearance was special and not general, cannot be sustained. The appearance was for the purpose of challenging the validity of the order making the assessment, and not solely for the purpose of challenging the jurisdiction of the court. The fact that appellants style their appearance as special is immaterial. *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1, and cases cited in the opinion of *Walker, J.*

We find no error in the judgment.

Affirmed.

W. L. ROBERTS v. CHAS. DAVIS AND MRS. MARY MOORE.

(Filed 4 March, 1931.)

1. **Appeal and Error F b—Exceptions to charge must be specific in order to be considered on appeal.**

   In order for a charge of the court to the jury to be considered on appeal the appellant's exception must be specific in pointing out the supposed error and not merely a "broadside" exception, as in this case "defendant excepts to the charge of the court."

2. **Trial E e—Where party desires specific instructions he should make written request therefor.**

   Where the complaining party is not satisfied with an instruction by the court to the jury as being sufficiently specific, and the instruction is substantially correct as to the law, his remedy is by offering a prayer for instructions in accordance with his view on the subject.

APPEAL by defendant, Mrs. Mary Moore, from *Lyon, Emergency Judge,* and a jury, at November Term, 1930, of JOHNSTON. No error.

Succinctly: Plaintiff contended that on or about 22 December, 1919, Chas. Davis owned certain property in Smithfield, Johnston County, N. C., and sold same at public auction, and C. I. Pierce, Geo. T. Pool and he (W. L. Roberts) became the last and highest bidders for said land, in the sum of $9,725. That the deed was made by Chas. Davis to C. I. Pierce, trustee for C. I. Pierce, Geo. T. Poole and W. L. Roberts, dated 22 December, 1919, and duly recorded in Book 66, page 392, register of deeds office for said county. The consideration stated in this deed is $9,725. That he paid his part of the purchase money for the land.

Mrs. Mary Moore, the defendant, in her answer, among other things, says that C. I. Pierce and Geo. T. Poole made a mortgage on said land to Chas. Davis for $7,293.75 which was duly recorded. "The said Chas. Davis, on or about 4 January, 1922, instituted in the Superior Court of Johnston County foreclosure proceedings against the administrators of Geo. T. Poole, who was then deceased, and C. I. Pierce, and subsequently obtained an order of the Superior Court for the sale of said lands under and by virtue of said mortgage and a commissioner of the court was appointed to conduct the sale and execute a deed to the purchaser; that, on 18 May, 1925, after due advertisement, the commissioner sold said lands and this defendant became the last and highest bidder for same at the price of $3,465, and on 11 June, 1925, complied with the terms of said sale, paid the purchase price, and on 25 June, 1929, received a deed from E. F. Ward, commissioner, and promptly recorded the same."

Further: "That said C. I. Pierce was trustee for Geo. T. Poole and C. I. Pierce only, and was not trustee in any sense for W. L. Roberts; that the said W. L. Roberts had and now has no interest in and to said property, and the said C. I. Pierce was never, in fact, trustee for said W. L. Roberts; that it was recited in said deed that C. I. Pierce was trustee for Geo. T. Poole, C. I. Pierce and W. L. Roberts by the mutual mistake of said parties; that prior to the execution of said deed the said W. L. Roberts had failed and neglected to pay his part of the cash payment, and on the date of the execution of said deed failed and neglected to secure the deferred payments in accordance with the agreement made and entered into at the time of sale of said property by the defendants, Charles Davis and said purchasers; that he never put one penny in said property, either before the making of said deed at the time of its delivery or subsequent thereto and has no beneficial interest in the same."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the name of W. L. Roberts included in the deed executed by Chas. Davis on 22 December, 1919, by mistake, as alleged in the answer? Answer: No.

2. What sum of money, if any, did the plaintiff pay upon the purchase price of the property described in the complaint? Answer: $3,241.66.

3. Are the parties hereto the owners and tenants in common of the land, as alleged in the complaint? Answer: Yes."

The court below rendered judgment for plaintiff on the verdict. The defendant, Mrs. Mary Moore, made numerous assignments of error and appealed to the Supreme Court.

Winfield H. Lyon for plaintiff.

E. J. Wellons and W. L. Whitley for defendant, Mrs. Mary Moore.

PER CURIAM. The record discloses that exception to the charge was as follows: "Defendants except to the charge of the court." This is not *specific.*

In *Rawls v. Lupton,* 193 N. C., at p. 430, speaking to the subject, citing numerous authorities: "Errors must be specifically assigned. An 'unpointed, broadside' exception to the 'charge as given' will not be considered. *McKinnon v. Morrison,* 104 N. C., 354. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court."

In *Cecil v. Lumber Co.,* 197 N. C., at p. 82, is the following: "The assignments of error, appearing on the present record, are not sufficiently definite to enable the court to understand what questions are sought to be presented, without a voyage of discovery through the record. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992. Hence, the motion of plaintiffs to dismiss the appeal and to affirm the judgment for failure to comply with Rule 19, section 3, would seem to be well founded. *Porter v. Lumber Co.,* 164 N. C., 396, 80 S. E., 443."

Notwithstanding the assignment of error that the charge of the court below is not properly presented on the record, we have examined the portion of the charge pointed out on the argument in this Court as error, but can see no prejudicial or reversible error. The charge of the court below, as pointed out on the argument as error made by the court below, we think on the facts substantially correct. If defendant had wanted a charge more specific, a prayer should have been requested. On the whole record we can see no error. By an examination of the records in the office of the register of deeds it appears that defendant, before she purchased, could have discovered the title of plaintiff to one-third interest in the land. It may be hard measure on the defendant, Mrs. Mary Moore, but, as there is no error in law, we have nothing to do with the findings of fact; that is for the jury to determine. The jury found the disputed facts for plaintiff.

No error.

C. O. PRICE, ADMINISTRATOR OF HULDA COOK, v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, INCORPORATED.

(Filed 4 March, 1931.)

Trial G a—After court has refused to grant motion of nonsuit he may not set aside verdict for insufficiency of evidence as matter of law.

Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, and where he has done so the cause will be remanded for further proceedings, and in this case the appeal is thus disposed of although the trial court set aside the judgment but failed to set aside the verdict, the failure to set aside the verdict being due, perhaps, to inadvertence.

APPEAL by plaintiff from *Moore, Special Judge,* at December Special Term, 1930, of HALIFAX. Error and remanded.

Allen C. Zollicoffer for plaintiff.
Parker & Allsbrook for defendant.

ADAMS, J. This action was instituted by the plaintiff as administrator of Hulda Cook, deceased, to recover of the defendant one hundred and seventy-five dollars alleged to be due on a policy of insurance. At the close of the plaintiff's evidence the defendant moved for judgment of nonsuit, which was denied. The defendant excepted and declined to introduce evidence. The only issue was this: "What sum, if any, is the plaintiff entitled to recover of the defendant?" His Honor instructed the jury to answer the issue $175 if they found the facts to be as testified by the witnesses and shown by the documentary evidence. A verdict was returned and a judgment was rendered in favor of the plaintiff for this sum. Thereafter the defendant moved to set aside the verdict and judgment and his Honor, being of opinion that he had erred in denying the defendant's motion for nonsuit, set aside the judgment as a matter of law, and not as a matter of discretion. The plaintiff excepted and appealed.

Three facts appear from the order vacating the judgment: (1) Only the judgment is set aside; the verdict remains; (2) the ground upon which the judgment was vacated was the insufficiency of the plaintiff's evidence; (3) the judgment was declared void, not as a matter of discretion, but as a matter of law.

The appeal is intended to present the question whether the plaintiff's evidence is of enough probative value to sustain the verdict. As the reason for interfering with the judgment was the alleged insufficiency of the evidence, the failure to set aside the verdict was perhaps due to inadvertence. At any rate, the record presents the case of a verdict in favor of the plaintiff with no judgment upon the verdict.

The statute provides that when the plaintiff has introduced his evidence and rested his case, the defendant may move for dismissal of the action or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal; if denied, the defendant may except, and if he introduces no evidence the jury may pass upon the issues and the defendant shall have the benefit of his exception on appeal to the Supreme Court. If the motion of the defendant is refused he may waive his exception and introduce evidence, and after all the evidence is in he may again move for nonsuit or dismissal of the action. If, upon consideration of all the evidence the court refuses this motion he may except and have the benefit of his exception on appeal. C. S., 567.

In the interpretation of the statute this Court has held that the trial judge has no power to grant the defendant's motion to dismiss the action for insufficient evidence as a matter of law after the verdict has been returned. *Godfrey v. Coach Co., ante,* 41. "The judge has no power to extend the time by amending the statute so as to permit the motion to be made . . . after verdict." *Riley v. Stone,* 169 N. C., 421; *Nowell v. Basnight,* 185 N. C., 143. After verdict he is remitted, on this point, to the exercise of his discretion. *Lee v. Penland, ante,* 340.

While a motion to dismiss for insufficient evidence must be disposed of before verdict in the way the statute prescribes, a motion to set aside a verdict or judgment may be entertained for other errors of law committed during the trial, such, for example, as error in the admission or rejection of evidence or in the charge of the court to the jury. But in these and similar cases the error of law should be set out in the order.

If a verdict for the plaintiff is undisturbed and a final judgment is given for the defendant, a new trial will ordinarily be granted (*Morgan v. Owen, ante,* 34; *Jernigan v. Neighbors,* 195 N. C., 231); but if before verdict the judge refuses a motion to dismiss for want of adequate evidence under the statute and later, as a matter of law, sets aside a verdict returned on the evidence, on the ground that he deems the evidence insufficient, the order will be reversed and the cause remanded for further proceedings. *Godfrey v. Coach Co., supra; Lee v. Penland, supra.*

In the present case his Honor denied the motion for nonsuit and signed a judgment on the verdict in behalf of the plaintiff. Afterwards he concluded that the evidence did not sustain the verdict and set aside the judgment, According to the decisions last cited the order will be vacated and the cause remanded for further proceedings.

This conclusion not only conforms to the antecedent construction of the statute; it tends to prevent the unnecessary multiplicity of appeals.

Error and remanded.

W. P. GHOLSON v. S. T. SCOTT.

(Filed 4 March, 1931.)

Appeal and Error J e—Plaintiff held not to be prejudiced by allowance of amendment to answer in this case.

Where, in an action involving the issue of negligence, contributory negligence is pleaded in substance by defendant, an amendment allowed defendant to make his allegation more specific is not held reversible error under the facts of this appeal. C. S., 545, 547.

APPEAL by plaintiff from *Sinclair, J.*, at October Term, 1930, of VANCE. No error.

Perry & Kittrell and J. P. & J. H. Zollicoffer for plaintiff.
B. H. Hicks and Hicks & Stem for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury caused by his being struck by an automobile driven by the defendant. The jury found from the evidence that the plaintiff had been injured by the negligence of the defendant and that the plaintiff by his own negligence had contributed to his injury. No damages were assessed.

As a defense contributory negligence was pleaded in substance but not according to the usual formula, and the presiding judge permitted the defendant to make the plea more specific by amendment. The amendment was drafted but, having been lost, it is not set out in the record.

It is hard to see how the plaintiff could have been misled or prejudiced by the amendment, which was introduced merely to make the defense more definite. C. S., 545, 547.

No error.

HOME BUILDING, INC., v. H. W. NASH, T. B. DIXSON, MRS. MARY DIXSON AND BROWN-ROGERS-DIXSON COMPANY.

(Filed 11 March, 1931.)

1. **Fraud B a—In this case held: plaintiff alleged action for fraud and issues tendered by defendant were correct.**

   Where a material furnisher brings action against the owner of a building, the contractor and another material furnisher for damages caused by the procurement of a waiver by the plaintiff material furnisher of his right of lien, the plaintiff alleging that the defendants conspired together to obtain the waiver by fraud, *Held:* the action is not to enforce a lien or to establish the right of the plaintiff to participate in any funds in the hands of the owner, but is an action for damages based upon allegations of fraud and conspiracy in procuring the waiver, and issues thereon tendered by the defendants were proper and should have been submitted to the jury, and the plaintiff would be entitled to recover thereon provided that competent evidence was offered on such issues.

2. **Fraud C c—Agreement of contractor to pay pre-existing debt out of contract price held no evidence of fraud as to materialmen.**

   In an action by a material furnisher against the owner of a building, the contractor and another material furnisher, to recover damages for fraud and conspiracy in obtaining from the plaintiff a waiver of his right of lien, the fact that the owner and the contractor agreed that the contractor should pay out of the contract price a preëxisting debt owed to the defendant material furnisher, a corporation in which the owner was interested, is not evidence of fraud in obtaining the waiver, the plaintiff having no right in the contract price until notice to the owner, nor is the fact that, sometime after the plaintiff signed the waiver, the contractor failed to disclose the agreement evidence of fraud as to him in obtaining the waiver and therefore is not evidence of such as against his alleged coconspirators.

3. **Laborers' and Materialmen's Liens E a—Plaintiff held remitted to right to participate in funds in hands of owner.**

   The legal effect of a valid waiver of lien, under the circumstances disclosed by the present record, is to remit the plaintiff to his right to participate in any fund in the hands of the owner.

CIVIL ACTION, before *Stack, J.*, at September Term, 1930, of FORSYTH.

The plaintiff is a corporation with principal office at Asheboro, North Carolina, and engaged in the business of manufacturing and selling lumber and millwork.

The defendants, T. B. Dixson and Mrs. Mary Dixson, are husband and wife. Dixson and his wife were desirous of having a house constructed on a lot owned by the defendant Dixson. An architect prepared plans and specifications which were duly submitted to various contractors. When the bids were received and canvassed it was ascertained that the bid of defendant Nash for the construction of said residence was the low bid. There was evidence tending to show that the owners required a bond for the faithful performance of the contract, and that the contractor Nash, being unable to procure bond, proposed to the owners that he would secure a waiver of lien from certain materialmen covering necessary material for the building. Thereupon, on 13 October, 1928, a written contract was entered into between the defendant Nash and the Dixsons according to the terms of which Nash was to construct a house according to the plans and specifications prepared by Northup and O'Brien, architects, for the stipulated price of $22,250. Payments were to be made upon certificates of the architects upon the basis of eighty per cent of the value of material delivered upon the ground and incorporated in the building. The contract further provided that out of the contract price the contractor Nash was to pay to the defendant Brown-Rogers-Dixson Company the sum of $5,499.11 upon a preexisting indebtedness. The defendant T. B. Dixson was an officer of said Brown-Rogers-Dixson Company. On 24 October, 1928, the defendant Nash approached the plaintiff Home Building, Inc., and secured a waiver of lien directed to the architects and worded as follows: "We are writing to advise that we will furnish the framing and millwork for residence for Mrs. Mary Dixson—H. W. Nash, contractor, and will waive our right of lien." There was evidence tending to show that the original contract was made on 29 September, 1928, and that the original contract did not contain the provision with respect to paying the preëxisting indebtedness to Brown-Rogers-Dixson Company. Upon the other hand there was evidence that the actual contract was the contract of 13 October, and that the confusion of dates was due to inadvertence of the typist.

Nash proceeded with the work, receiving checks from time to time from the owner and paying from time to time out of the contract price so received, portions of the Brown-Rogers-Dixson Company indebtedness.

Thereafter Nash could not complete the work and the owner proceeded to complete the contract. The jury found when the work was completed that there were outstanding claims due various materialmen, including the plaintiff, in the sum of $9,156.18, and that the owners owed the contractor $4,149.28 over and above the sum of $5,449.11 paid to Brown-Rogers-Dixson Company. The evidence further tended to show that when the contractor Nash approached the plaintiff about furnishing material that he did not state to plaintiff that $5,449.11 of the contract price was to be paid to Brown-Rogers-Dixson Company. However, it does not appear that the plaintiff asked for such information or made any request to see the contract in order to be apprised of its terms. Thereafter, on or about 9 May, 1929, the plaintiff, in company with his attorney, went to see the defendant T. B. Dixson and gave him notice of the claim for material "and we asked him if any of the funds going from the general contractor had been diverted to Brown-Rogers-Dixson Company or anybody else for material that did not go into the job, and he said it had not. We then asked him how much was due Mr. Nash, contractor, balance on general contract, and he would not answer."

The evidence further showed that all checks issued by the owner to the contractor upon the contract price were made out in the name of the contractor, and that all payments made on the Brown-Rogers-Dixson Company claim were from checks made payable to Nash, the contractor, and endorsed by him.

Thereafter, on 20 June, 1929, the plaintiff brought this action against the defendants, alleging that the defendant T. B. Dixson was an officer of Brown-Rogers-Dixson Company, and that said Dixson and said corporation and the contractor had entered into a conspiracy to cheat and defraud the plaintiff and to procure from him the said waiver of lien upon the property of the owner, and that by reason of such fraud and conspiracy the plaintiff had been damaged in the sum of $3,308.93, said amount being the value of material furnished by the plaintiff to the contractor and used in the residence of defendants.

Certain issues were submitted to the jury.

The defendants objected to the issues submitted and tendered the following issues:

1. "Was the release and the furnishing of materials procured from the plaintiff by fraud or conspiracy of the defendants, H. W. Nash, T. B. Dixson, Mrs. Mary Dixson, and Brown-Rogers-Dixson Company?"

2. "If so, which of them?"

3. "What amount, if any, is the plaintiff entitled to recover of the defendant, H. W. Nash?"

4. "What damages, if any, is the plaintiff entitled to recover of the defendants?"

The court declined to submit the issues tendered by the defendants.

Upon the verdict of the jury judgment was rendered against Nash, T. B. Dixson, and Brown-Rogers-Dixson Company for the sum of $3,308.98, together with interest and costs.

From judgment so rendered the defendants appealed.

Parrish & Deal for plaintiffs.

Ingle & Rucker and Manly, Hendren & Womble for defendants.

BROGDEN, J. 1. Was the waiver of lien executed by the plaintiff procured by the fraud of the contractor or as a result of a conspiracy between the defendants?

2. What was the legal effect of such waiver?

At the outset it is to be observed that this suit is not instituted for the purpose of enforcing a lien or to establish the right of participation in any funds that may be left in the hands of the owner due the contractor. It is a typical action for damages based upon allegations of fraud and conspiracy in procuring from the plaintiff a waiver of lien. Therefore, it is obvious that many of the issues submitted to the jury had no bearing upon the vital questions in controversy. If the contractor secured the waiver of lien by fraud and the other defendants participated therein or conspired with the contractor to defraud the plaintiff of the protection and security of a lien, and such facts be found by a jury, the plaintiff would be entitled to recover upon the causes of action as laid in the pleadings, provided of course that competent evidence was offered upon the issues submitted.

The agreement by the contractor to pay a preëxisting debt to a creditor out of the proceeds of the contract price was not unlawful, and in itself, constituted no evidence of fraud. *Rose v. Davis,* 188 N. C., 355. Such contract price is not deemed by the law to be a trust fund until notice has been given to the owner. *Foundry Co. v. Aluminum Co.,* 172 N. C., 704. Moreover, the legal fiction of a trust fund after notice, is designed exclusively for the purpose of enabling the claimant to share in the fund or proceeds undistributed and then remaining in the hands of the owner and due upon the contract price. Hence the issues submitted by the defendants were the proper issues arising upon the pleadings and should have been submitted to the jury.

The defendant Nash filed an answer in which he failed to deny the allegations of fraud, contained in the complaint, but set up the defense that he had been adjudicated bankrupt on 3 June, 1929, and pleaded the bankruptcy act as a bar to recovery. Thus the allegations of fraud are not denied by the defendant Nash. The plaintiff, however, cannot recover against the other defendants unless there is competent evidence tending to show that said defendants participated in any fraud committed by Nash or ratified the same. A careful analysis of the record fails to produce the conclusion, upon the record now before the court, that any evidence of such participation or ratification was offered. It is true that on 9 May, long after the contract had been made, the defendant Dixson did not make a full disclosure to the plaintiff and his attorney with respect to various payments made to the contractor, but this conversation produces no evidence of fraud in the procurement of a release of a lien secured many months prior thereto. And if not sufficient to fix liability upon the defendant Dixson, it necessarily follows that it was not sufficient to fix liability upon the Brown-Rogers-Dixson Company upon the evidence offered at the trial.

The legal effect of a valid waiver of lien, under the circumstances disclosed by the record, is to remit the plaintiff to his right to participate in any fund in the hands of the owner.

New trial.

W. H. LAUGHINGHOUSE AND HOOD SYSTEM INDUSTRIAL BANK v. GREAT NATIONAL INSURANCE COMPANY.

(Filed 11 March, 1931.)

1. **Insurance J d—Mere assignment of debt does not violate stipulation in policy against further encumbrance of property.**

   A seller of an automobile retaining title to secure a note given for the balance of the purchase price assigned the note it secured to another who received from the purchaser a renewal note in a smaller amount extending the time of payment and retaining the original papers as collateral, *Held:* the transaction did not increase the risk of the insurer of the automobile or release it from liability upon the destruction of the automobile by fire, and defendant's motion as of nonsuit upon the evidence of the plaintiff was improvidently allowed.

2. **Insurance K a—Evidence of knowledge of local agent, constituting waiver of provision of policy, should have been submitted to jury.**

   In the absence of fraud and collusion between the insured and the local agent of the insurer, knowledge of the local agent will be imputed to the insurer, and where the insurer seeks to escape liability for a fire loss covered by the policy on the ground that other insurance, taken out on the subject-matter of the policy, was in effect and that the policy sued on provided that the insurer would not be liable if the property insured was covered by other insurance, evidence that the agent of the insurer had examined the other policy of insurance and declared that it was void, and had issued the policy sued on with this understanding, is sufficient evidence of waiver of the provision of the policy relating thereto, and the issue as to whether the other insurance was in effect and whether if in effect the insurer had waived the provision in its policy relating thereto, should be submitted to the jury.

3. **Estoppel C e—Usually waiver or estoppel must be pleaded, but in this case allegations were sufficient to warrant submission of issue.**

   As a general rule waiver of estoppel must be pleaded, but in this case *Held:* the pleadings were not too indefinite to warrant the submission of the issue to the jury.

APPEAL by plaintiffs from *Sinclair, J.,* at September Term, 1930, of PITT, dismissing the action as in case of nonsuit. New trial.

On 28 April, 1928, W. M. Laughinghouse, one of the plaintiffs, bought an automobile from the Pitt Chevrolet Company, to whom he executed a conditional sales contract to secure a deferred payment of $367.65, payable six months after date. On the same day the General Exchange Insurance Corporation issued to him a policy of insurance to protect the car against loss or damage by fire, which was to be effective for a period of one year. He reduced the deferred payment to $209, and on 24 November, 1928, executed and delivered to the Pitt Chevrolet Company a note for $209, which was to become due on 24 February,

1929. The note was endorsed by the Pitt Chevrolet Company and J. Knott Proctor, its secretary and treasurer, and together with the conditional sales contract was transferred to the Hood System Industrial Bank. On 5 November, 1929, W. M. Laughinghouse executed and delivered to this bank a renewal note in the sum of $200, payable 9 May, 1930, which was an extension of the note dated 24 November, 1928. It was endorsed by J. Knott Proctor. The parties agreed that the former note and all rights growing out of it should be held as security for the latter.

The defendant, through J. B. Oakley, its agent, on 2 April, 1929, issued and delivered to W. M. Laughinghouse a policy insuring the car against the perils of fire, and on 11 April, 1929, the car was burned.

The plaintiffs furnished proof of loss and afterwards brought suit on the policy issued by the defendant. Liability was denied on the ground that the policy issued by the General Exchange Insurance Corporation was still in force and that the defendant by reason of a provision in its policy was not bound. At the close of the evidence the court dismissed the action and the plaintiffs excepted and appealed.

Harding & Lee for plaintiffs.
Kenneth C. Royall and Andrew C. McIntosh for defendant.

ADAMS, J. The policy issued by the General Exchange Insurance Corporation purports in express terms to be effective from noon, 28 April, 1928, to noon, 28 April, 1929. The car was burned 11 April, 1929. The policy, issued by the defendant on 2 April, 1929, contains this provision: "No recovery shall be had under section 1 of the schedule of perils if at the time a loss occurs thereunder there be any other insurance covering such loss, which would attach if this insurance had not been effected." Both policies cover loss by fire and lightning.

The appeal, therefore, presents the question whether at the time the loss occurred the policy issued by the General Exchange Insurance Corporation was in effect. The appellants say in the first place, that it was void by reason of the transfer to the Hood System Industrial Bank of the lien on the car, no notice of the lien having been endorsed on the policy. The defendant contends that the policy should not be declared of no effect on this ground. The existence of a lien in favor of the dealer or its assignees is acknowledged in the policy. The Pitt Chevrolet Company is the dealer and, apparently, the Hood System Industrial Bank is the dealer's assignee. The note executed to the bank is described as the "extension of a note executed by W. M. Laughinghouse and endorsed by the Pitt Chevrolet Company and J. Knott Proctor on 24 November, 1928." We do not perceive how the mere renewal or "extension" of the note either increased the risk or diminished the security. As a rule the renewal of a security does not work the forfeiture of a policy which contains a condition against encumbrances. In *Bowles v. Phœnix Ins. Co.,* 20 L. R. A., 400, it is said: "As the debt is unchanged the risk of the insurer is not augmented. The reason for the rule that the creation of an encumbrance in violation of the terms of the policy works a forfeiture has been thus stated: 'It (the rule) goes upon the theory of an increased risk by reason of encumbrances. If a man may encumber his property to its full value and then insure it to its full value, it may be easily seen how it may be turned into a source of profit. *Brown v. Commercial Mut. Ins. Co.,* 41 Pa., 187.' "

It is also contended by the appellants that the defendant waived the provision of the policy sued on respecting other insurance and that the defendant is therefore estopped to say that the appellants have forfeited their right to compensation. This position is based upon evidence tending to show that W. M. Laughinghouse exhibited to the defendant's agent the policy issued by the General Exchange Insurance Corporation and said he had been informed by J. Knott Proctor that the policy was not in effect; that the defendant's agent had an opportunity to examine it; and that he took from it the description of the property insured by the policy in suit. It is held that in the absence of fraud or collusion between the insured and the agent the knowledge of the agent, when acting within the scope of the powers intrusted to him, will be imputed to the company, though the policy contains a stipulation to the contrary. *Short v. LaFayette Ins. Co.,* 194 N. C., 649; *Ins. Co. v. Grady,* 185 N. C., 348.

As we understand the record, the question whether the policy issued by the General Exchange Insurance Corporation is valid should be determined by the jury upon consideration of the evidence and if it is valid the question of waiver should likewise be submitted to the jury. It is insisted that estoppel or waiver must be pleaded, and as a rule this is true. *Mfg. Co. v. Assurance Co.,* 110 N. C., 176; *Clegg v. R. R.,* 135 N. C., 148, 154; *Modlin v. Ins. Co.,* 151 N. C., 35; *Shuford v. Ins. Co.,* 167 N. C., 547. But we are not prepared to say that the plaintiff's allegations are too indefinite to justify the submission of an issue on this question.

In dismissing the action there is error for which a new trial must be awarded.

New trial.

FEDERAL RESERVE BANK OF RICHMOND, VA., v. G. S. ATMORE, TRADING AS NEUSE MOTOR COMPANY, AND G. S. ATMORE, INDIVIDUALLY.

(Filed 11 March, 1931.)

1. **Bills and Notes H b—Motion to strike out held properly allowed, defendant having right to present all defenses upon the pleadings.**

   The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee, and where the answer after the plaintiff's motion to strike irrelevant and immaterial matter therefrom had been granted, sufficiently alleges that the holder was not a holder in due course for value without notice, the order allowing the motion to strike out will not be held for error, all defenses which the defendant may have being presentable under the pleadings. C. S., 3009, 3033, 3038, 3040.

2. **Pleadings I a—Order granting motion to strike out irrelevant and immaterial matter from answer held not error.**

   Where upon the plaintiff's motion, made in apt time, C. S., 537, an order is made striking out certain parts of the answer as being irrelevant and immaterial, and the answer, after the matters objected to have been stricken out, is sufficient to raise all issues of law or fact involved, and the defendant is not deprived of any substantial right or defense thereby, the order will not be held for error.

3. **Appeal and Error A d—Granting of motion to strike out matter from pleadings, addressed to court as matter of right, is appealable.**

   Where a motion to strike out certain matters in the pleadings is addressed to the court as a matter of right and not as a matter of discretion, an order granting the motion is reviewable on appeal.

4. **Appeal and Error F c—Exception to order not appealed from will not be considered.**

   Upon defendant's appeal from an order of the trial court striking out irrelevant and immaterial matters from the pleadings, another order in which a party to the action is made, excepted to but not appealed from, will not be considered.

APPEAL by defendant from *Small, J.*, at January Term, 1931, of CRAVEN. Affirmed.

This is an action on two promissory notes, negotiable in form, and executed by defendant, G. S. Atmore, trading as Neuse Motor Company. Both said notes were endorsed by the defendant, G. S. Atmore, individually, before their delivery to the payees named therein, respectively.

One of said notes, for the sum of $5,000, dated 28 September, 1929, and due on 29 October, 1929, was payable to the order of the maker. This note with the endorsement of the maker was negotiated to the First National Bank of New Bern, N. C., and by said bank to the plaintiff, now the holder thereof.

The other note, for the sum of $2,000, dated 8 October, 1929, and due thirty days after date, was payable to the order of the First National Bank of New Bern, N. C. This note with the endorsement of the payee was negotiated to the plaintiff, now the holder thereof.

In its complaint, plaintiff alleges, both specifically and generally, that it is the holder in due course, and for value, of each of said notes. Defendant, in his answer, denies both the specific and general allegations of the complaint to the effect that plaintiff is the holder of said notes in due course and for value. In addition to said denials, in defense of plaintiff's right to recover in this action, defendant alleges certain matters, both of law and of fact, all of which challenge the right of plaintiff to recover in this action as a holder in due course, and for value, on the notes set out in the complaint.

The action was heard on plaintiff's motion that certain matters alleged in the answer be stricken therefrom, on the ground that said matters, specifically pointed out in the motion, which was in writing, are irrelevant and immaterial, impertinent and frivolous. This motion was allowed.

From the order directing that certain matters alleged in the answer, and specifically pointed out in the order, be stricken from the answer, in accordance with the motion of the plaintiff, defendant appealed to the Supreme Court.

W. H. Lee and M. G. Wallace for plaintiff.
Guion & Guion for defendant.

CONNOR, J. The defendant admits in his answer the execution and endorsement by him of each of the notes sued on in this action.

He alleges that he executed and endorsed the note for $5,000, for the accommodation of the First National Bank of New Bern, N. C., and that he received no value for said note from said bank. C. S., 3009. It is alleged in the complaint that this note was negotiated by the First National Bank of New Bern, N. C., to the plaintiff.

The defendant admits in his answer, that he received value for the note for $2,000, from the payee, the First National Bank of New Bern, N. C. He alleges, however, that he has a set-off or counterclaim against the First National Bank of New Bern, N. C., with respect to said note. It is alleged in the complaint that this note was negotiated by the First National Bank of New Bern, N. C., to the plaintiff.

Neither of the defenses alleged in the answer will avail defendant in this action if, as alleged in the complaint, the plaintiff is the holder in due course, and for value, of each of said notes. C. S., 3033, 3038. If, however, it is shown at the trial of the action, that defendant executed and endorsed the note for $5,000, for the accommodation of the First National Bank of New Bern, N. C., and received no value from said bank for said note; or if it is shown at the trial that defendant has a valid offset or counterclaim against the First National Bank of New Bern, N. C., with respect to the note for $2,000, then, in either case, the burden will be on plaintiff to prove, as alleged in the complaint, that plaintiff is the holder in due course, and for value of said notes, or of either of them. C. S., 3040. *Whitman v. York,* 192 N. C., 87, 133 S. E., 427. Otherwise, each of said notes, although held by the plaintiff at the commencement of this action, as the result of its negotiation to plaintiff by the First National Bank of New Bern, N. C., is subject to the same defenses as are available to the defendant against said bank. C. S., 3039. *Whitman v. York, supra.*

Defendants' answer, after the matters alleged therein have been stricken therefrom, as irrelevant and immaterial, is sufficient to raise issues both of law and of fact, involving the right of plaintiff to recover in this action, as the holder in due course of the notes sued on. The matters stricken from the answer are at least irrelevant and immaterial. The order striking said matters from the answer does not deprive defendant of any substantial right or defense at the trial of the action founded upon his equities against the First National Bank of New Bern, N. C.

Plaintiff's motion was made in apt time. C. S., 537. It was not addressed to the discretion of the Court, but was made as a matter of right. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794. The order was therefore subject to review by this Court on defendants' appeal. However, there was no error in the order, and it is therefore affirmed.

The validity of the order made in this action by Judge Small, at November Term, 1930, of the Superior Court of Craven County, directing that the receiver of the First National Bank of New Bern be made a party defendant to this action, is not involved in this appeal by the defendant from the order made at January Term, 1931. Plaintiff excepted to the order making the receiver a party, but has not appealed from said order. We therefore do not pass upon the question discussed in the brief of plaintiff, as appellee on this appeal, as to the effect of the order at January Term, 1931, upon the order of November Term, 1930. The order involved in this appeal is

Affirmed.

IN RE WILL OF JOHN D. BROWN.

(Filed 11 March, 1931.)

1. **Wills D c—Burden of proving mental incapacity is on caveators.**

   Where a will is caveated on the ground of mental incapacity the burden of proof is on the caveators alleging it to establish the invalidity of the will on this ground.

2. **Trial E g—Conflicting instructions on material matter entitles prejudiced party to new trial.**

   Where upon the trial of the issue of *devisavit vel non* the trial judge in his instructions to the jury first correctly places the burden of proof on the caveators, and later on the propounders, the instructions are conflicting upon a material matter, and prejudicial to the propounders, constituting reversible error.

3. **Appeal and Error J e—Error in this case held not cured by verdict.**

   Where in caveat proceedings separate issues as to mental capacity and undue influence are submitted to the jury, their verdict on the issue of undue influence in favor of the caveators will not be held to render error in the trial in regard to the issue of mental capacity harmless, the court having instructed them not to consider the issue of undue influence if the issue of mental capacity were answered in favor of propounders, and it being permissible to infer that the second issue was perfunctorily answered.

APPEAL by propounder from *MacRae, Special Judge,* at August Term, 1930, of DUPLIN.

Issue of *devisavit vel non,* raised by a caveat to the will of John D. Brown, based upon alleged mental incapacity and undue influence.

Separate issues of due execution, mental incapacity and undue influence were submitted as to the original will and as to each of two codicils.

On the second issue as to whether the testator had sufficient mental capacity to make a will at the time of its execution, the court at first correctly placed the burden of proof on the caveators to establish his mental incapacity, then later in the charge, induced perhaps by the form of the issue, he inadvertently shifted the burden on this issue to the propounder.

From a judgment sustaining the caveat, the propounder appeals, assigning errors.

Oscar B. Turner, T. J. Gresham, Jr., and R. D. Johnson for propounder.

No counsel appearing for caveators.

STACY, C. J. The conflict in the charge on a material issue entitles the propounder to a new trial. It is well settled that where there are conflicting instructions with respect to a material matter, a new trial must be granted, as the jurors are not supposed to know which one of the two states the law correctly, and we cannot say they did not follow the erroneous instruction. *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *Edwards v. R. R.,* 132 N. C., 99, 43 S. E., 585.

Again, it has been the law of this jurisdiction, since the decision in *Mayo v. Jones,* 78 N. C., 402, that, upon the trial of an issue of *devisavit vel non,* the burden of proving the alleged insanity of a testator is on the caveator or the one who alleges it. *In re Burns' Will,* 121 N. C., 336, 28 S. E., 519.

It is true, the issue of undue influence was also answered in favor of the caveators, which ordinarily would render an error on the separate issue of mental incapacity harmless (*In re Rawlings' Will,* 170 N. C., 58, 86 S. E., 794), but as this was contrary to the court's instruction, the judge having told the jury not to consider the issue of undue influence, if the issue of mental incapacity were answered in favor of the caveators, which it was, we cannot say that the jury did not thereafter act perfunctorily in determining the issue of undue influence.

On the issue of the due execution of the original will, and perhaps the codicils as well, it would seem that the propounder was entitled to a directed verdict.

As to whether those of the caveators who have heretofore accepted benefits under the will, will or will not be estopped from sharing in the estate or be required to account for such benefits, in the event the caveat is sustained, is not now before us for decision.

New trial.

S. B. PARKER CO. v. THE COMMERCIAL NATIONAL BANK OF HIGH POINT, ET AL.

(Filed 11 March, 1931.)

1. **Appeal and Error E h—In this case held: appeal was limited to correctness of judgment of lower court.**

   In this case held: the record containing no statement of case on appeal, the Supreme Court is limited to the question of whether there was error in the judgment, the appeal being an exception thereto.

2. **Mortgages H b—Plaintiffs held entitled to have order restraining foreclosure continued to hearing in order to ascertain amount of debt.**

   Where in a civil action by the receiver of a mortgage company and junior lienors to restrain the foreclosure of a mortgage and to have the debt secured thereby credited with sums alleged to have been paid, and to have the amount of the debt reduced by the forfeiture of interest, it being alleged that the contract was tainted with usury, *Held:* although the plaintiffs would not be entitled to injunctive relief as a deliverance from alleged exaction of usury, upon the defendant's demand for affirmative relief, the plaintiffs are entitled to know the correct balance due on the indebtedness in order to protect their interests, and a temporary order restraining the foreclosure is properly continued to the final hearing.

3. **Injunctions D b—Where great injury might result from dissolution, and no harm can come from continuance, temporary order will be continued.**

Upon a showing of a basis for injunctive relief equity will ordinarily continue a temporary order to the final hearing where great harm might result from its dissolution and no harm can result from its continuance.

APPEAL by defendants from *Nunn, J.,* in Chambers at New Bern, 27 October, 1930. From CRAVEN.

Civil action to restrain the foreclosure of a deed of trust and for an accounting, *i. e.,* to have the debt secured by said indenture (1) credited with all sums heretofore paid, and (2) reduced by a forfeiture of the entire interest charged, it being alleged that the same is tainted with usury.

The original plaintiffs, who are judgment lienors, subject to the deed of trust in question, and the receiver of the mortgagor company, contend that the correct amount of the indebtedness secured by said deed of trust is not more than $20,000, while the defendants contend that the correct balance due thereon is $25,524.79.

The defendants set up in their answer that all payments heretofore made on said indebtedness have been duly credited; that the same is free from usury, etc., wherefore they ask that the temporary restraining order be dissolved; that the correct amount of the debt be determined, and that the deed of trust be foreclosed and the property sold by a commissioner under orders of the court.

From a judgment continuing the temporary restraining order to the final hearing, with leave to the parties to amend their pleadings, the defendants appeal.

W. B. R. Guion and Whitehurst & Barden for plaintiffs.
W. H. Lee and Moore & Dunn for defendants.

STACY, C. J. As the record contains no statement of case on appeal, we are limited to the question whether there is error in the judgment, the appeal itself being an exception thereto. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713; *R. R. v. Stewart,* 132 N. C., 248, 43 S. E., 638; *Clark v. Peebles,* 120 N. C., 31, 26 S. E., 924.

Conceding that under the decisions cited and relied upon by the defendants, *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334, *Miller v.*

Dunn, 188 N. C., 397, 124 S. E., 746, and others of like import, plaintiffs would not be entitled to injunctive relief as a deliverance from alleged exaction of usury, had the defendants not demanded a foreclosure and also an accounting, nevertheless, under the decisions in *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576, *Elliott v. Brady,* 172 N. C., 828, 90 S. E., 951, and *Erwin v. Morris,* 137 N. C., 48, 49 S. E., 53, it would seem that they are entitled to know the correct balance due on the indebtedness secured by said deed of trust, in order to protect the interests of the receiver and judgment lienors. *Riley v. Sears,* 154 N. C., 509, 70 S. E., 997. In this respect, even from the viewpoint of the defendants, the judgment would seem to be well founded. And further, as the defendants have asked for affirmative relief, the authorities cited and relied upon by them would seem to be inapposite. At any rate, they are not regarded as controlling.

It is the general practice of equity courts, upon a showing of a basis for injunctive relief, to continue the restraining order to the final hearing, when it appears that no harm can come to the defendants from such continuance, and great injury might result to the plaintiffs from a dissolution of the injunction. *Cullins v. State College,* 198 N. C., 337, 151 S. E., 646; *Hurwitz v. Sand Co.,* 189 N. C., 1, 126 S. E., 171; *Seip v. Wright,* 173 N. C., 14, 91 S. E., 359.

Affirmed.

FRANCES AMELIA HENDERSON ET AL. v. WESTERN CAROLINA POWER COMPANY.

(Filed 11 March, 1931.)

1. **Wills E a—A devise will be construed to be in fee simple unless intention is expressed in will to convey estate of less dignity.**

   The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by C. S., 4162, providing that a devise of real estate shall be construed to be a devise in fee simple unless the will by plain and express words indicates an intention to convey an estate of less dignity.

2. **Wills E b—Devise in this case held to create a defeasible fee.**

   Where a will devises to the children of the testatrix certain lands to be equally divided between them, and by later item provides that if any of the children should die without leaving legitimate issue his or her share should go to the surviving children or grandchildren of the testator, *Held:* the will devises the fee to the children as tenants in common, defeasible upon their dying without legitimate issue them surviving.

3. Wills E d—The phrase "dying without issue" refers to the death of the first taker of the fee.

Where a will creates a limitation over in the event that the first taker of the fee should die without issue, the event refers to the death of the first taker of the fee, and upon his death the estate immediately vests absolutely in the contingent remaindermen.

4. Judgments L b—Decree for partition will not bar action relating to title to lands partitioned.

A final decree for partition of lands operates to sever the unity of possession but it does not convey title, and where the devisees under a will have been parties to a special proceeding for partition in which a final decree has been rendered, they are not estopped thereby from maintaining an action against the grantee of one of the devisees to recover the land conveyed.

5. Wills E d—In this case held: upon death of devisee without issue, other children of testator took as purchasers under the will.

Where a will devises property to the children of the testatrix as tenants in common and by later item provides that in the event of any of the children dying without legitimate issue them surviving the share of such child "shall go to such of my surviving children or grandchildren" as might be selected by the devisee, *Held:* the intent of the testatrix was to give her children and grandchildren the beneficial use of the property, and the devise is unequivocal and the intent is controlling, and the position that the later item does not affect the estate created by the prior item because the later item is not imperative, cannot be maintained.

6. Wills E h—Held: equity will execute power of appointment under the facts of this case.

As a rule equity will not aid the nonexecution of a mere power of appointment, but where the power is in the nature of a trust, equity will execute the power, and where the devise is to the children of the testator, and in the event that any one of them should die without issue him surviving, his share should go to the other children or grandchildren of the testatrix as selected by the will of the child dying without issue, and one of the children dies without issue and without exercising the power, *Held:* equity will apportion the property equally to all the members of the class described in the will.

APPEAL by defendant from *Shaw, J.*, at August Term, 1930, of BURKE. Affirmed.

This is an action to recover real property and damages for its wrongful detention. Pleadings were filed, a trial by jury was waived, and upon the facts as admitted by the parties and found by the court, judgment was rendered in favor of the plaintiffs and the defendant excepted and appealed.

Mrs. William Cornelia Henderson died in Burke County on 29 March, 1927, leaving a will, the seventh and ninth items of which are as follows:

"Seventh: All the balance and residue of my estate, real and personal or mixed wherever situated, I give and devise and bequeath to my said children to be equally divided to them, share and share alike."

"Ninth: Should any of my children die, leaving no legitimate issue of his or her own body, then the share of my estate herein devised or bequeathed to such child or children, shall go to such of my surviving children, or grandchildren as the testator may select, for his or her heirs or heir."

After her death Mrs. Henderson's children (L. P. Henderson, Charles C. Henderson, Augustus Henderson, Frances A. Henderson, Zalie B. Henderson, W. C. McDowell, M. R. Michaux and H. G. Edmonson) brought a special proceeding, *ex parte,* before the clerk of the Superior Court of Burke County for the partition of several tracts of the devised land. The proceeding was prosecuted to final judgment and the tract in controversy, containing about 201 acres, was allotted to Charles C. Henderson.

On 24 February, 1923, Charles C. Henderson and his wife executed a deed purporting to convey this land to W. B. Berry, an agent of the defendant; on 28 February, 1923, Berry and his wife executed a deed purporting to pass the title to A. M. Kistler, another agent of the defendant; and on 6 January, 1926, Kistler executed a deed purporting to convey the same land to the defendant, who entered into and has since retained possession of the property.

On 14 November, 1926, Charles C. Henderson died intestate, without issue, and without having exercised the power of appointment conferred upon him by the will of his mother, Mrs. William Cornelia Henderson.

The plaintiffs, who are the surviving children and grandchildren of Mrs. Henderson, instituted this action on 6 August, 1928.

Brooks, Parker, Smith & Wharton for plaintiffs.

W. S. O'B. Robinson, J. M. Mull, S. J. Ervin and S. J. Ervin, Jr., for defendant.

ADAMS, J. By the earlier common law a general devise of lands without words of perpetuity or limitation conveyed a life estate only, unless there was a manifest intention to give the fee; but in 1784 this rule was abolished by the enactment of a statute which provides that a devise of real estate shall be construed as a devise in fee simple unless by plain and express words it indicates an intent to convey an estate of less dignity. C. S., 4162. Standing alone, the seventh item of Mrs. Henderson's will therefore vested in her children a title in fee as tenants in common. In what respect is this devise modified by the ninth paragraph?

The partition of the land among the tenants was complete; a final decree had been made allotting the tract in controversy to Charles C. Henderson. He acquired his title subject to the provision that if he died leaving no legitimate issue, the share devised to him should go to such of the surviving children or grandchildren of the testatrix as he might select as his heirs. He died intestate, without issue, and without having made any appointment or selection of his successor. We deem it manifest that the seventh and ninth clauses of the will gave him a title in fee to his part of the land, defeasible upon the happening of these contingencies.

A defeasible fee is one which may continue, but is liable to be determined by some act or occurrence limiting its duration or extent. It is called a fee by virtue of the possibility of its continuance; it is said to be defeasible because its duration may depend upon a contingency. *West v. Murphy,* 197 N. C., 488.

The common law regarded a limitation contingent upon death as void for remoteness, and in order to evade the consequences sought some intermediate period to which the words "dying without issue" might be referred. *Yarn Co. v. Dewstoe,* 192 N. C., 121; *Hilliard v. Kearney,* 45 N. C., 221, 231. But in 1827 this rule was changed by the following statute: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight."

In considering the significance and effect of this statute we refer to *Patterson v. McCormick,* 177 N. C., 448. There the contested devise was in these words: "After the death of my mother I will and bequeath the plantation above mentioned to my nephews, John D. and Clem Jowers, to be equally divided between them. In case they or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson and to the surviving brother John D. or Clem Jowers, as the case may be, to be equally divided between them."

The life tenant died in 1877 and John D. Jowers in January, 1904, without surviving issue, and the court held that as the time of dying was to be referred to the death of John D. or Clem Jowers the title to the plantation vested, upon the death of John D. absolutely in the plaintiffs and in the defendants as purchasers from Clem.

In that case it is said that the rule laid down by the statute is obligatory on the courts and must be observed in all cases except when, as provided by statute, a contrary intent is expressly and plainly declared in the face of the deed or will, and that it is now established that the phrase "dying without heirs or issue," upon which a limitation over is to take effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period.

This construction of the act has been maintained in *Ex parte Rees,* 180 N. C., 192; *Willis v. Trust Co.,* 183 N. C., 267; *Ziegler v. Love,* 185 N. C., 40; *Vinson v. Gardner, ibid.,* 193; *Alexander v. Fleming,* 190 N. C., 815; *Yarn Co. v. Dewstoe, supra.*

The defendant contends that the testatrix gave to Charles C. Henderson an unconditional fee for two reasons: (1) Under the provisions of section 607 of the Consolidated Statutes and of the decree in the proceeding for partition all who were parties to that proceeding are estopped "in the same way and to the same extent as though they had executed a deed to Charles C. Henderson with full covenants of warranty"; (2) the ninth section of the will in no way enlarges, reduces, or diminishes the estate conferred by section seven, for the reason that the language purporting to create a limitation in default of "legitimate issue of his body" is not imperative.

With respect to the first contention we may say that section 607 is in Article 23 of the Code of Civil Procedure entitled "Judgment." It makes no specific reference to the partition of real property, which is effected by a special proceeding. It applies to any action wherein the court declares a party entitled to the possession of property and orders a conveyance of the legal title. In that event the statute authorizes the court in its discretion to declare in the order that the effect shall be to transfer the legal title. The clerk's decree or judgment in the special proceeding operates as a deed of conveyance "in as ample and valid manner and form as though the petitioners had executed deeds to each other for the respective lots assigned them." Certainly, if the tenants had executed deeds to one another they could have conveyed no greater interest than they acquired under the will; and according to their verified petition, they proceeded before the clerk in order that they might "hold their shares in severalty and under definite metes and bounds." The partition severed the unity of possession but conveyed no title. *Harrington v. Rawls,* 131 N. C., 39. There was no covenant of warranty to work an estoppel.

Nor do we concur in the defendant's second proposition. The evident intent of the testatrix was to give her children and grandchildren the beneficial use of her property, and to this end she directed that if any of her children died leaving no legitimate issue, the title conferred by the seventh clause of the will should go to other members of her family. To this extent the devise is unequivocal and the intent is controlling: in the event of the specific contingency "the share of my estate herein devised *shall* go to such of my surviving children and grandchildren, as the testator (Charles C. Henderson) may select for *his* heirs or heir." *Ellington v. Trust Co.*, 196 N. C., 755; *Brown v. Brown,* 195 N. C., 315; *Williams v. Best, ibid.,* 324.

Charles C. Henderson did not make any selection or appointment. What is the effect of his failure or refusal to do so?

As a rule equity will not aid the nonexecution of a mere power. In *Chewning v. Mason,* 158 N. C., 578, the testator devised land to his wife "during her natural life, and then to dispose of it as she sees proper." The Court held that the devised estate was property and the power of disposal a mere authority which she could exercise or not in her discretion. If she had exercised the power the fee would have gone to her grantee directly from the testator, she being the mere instrument by which the estate would have been conveyed. A use created under a power takes effect as if the use instead of the power had been inserted in the instrument containing the power. *Levy v. Griffis,* 65 N. C., 236. In the *Chewning case* the donee did not designate any class or individual as the successor of her title upon the occurrence of a contingency. In such cases equity will not ordinarily interfere. *Harrison v. Battle,* 21 N. C., 213; *Bond v. Moore,* 90 N. C., 239. "But in laying down this broad rule, we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. 'Powers (as *Lord C. J. Wilmot* had said) 'are never imperative'; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.' But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity, on the general rule that the trust is the land, will carry the trusts into execution at the expense of the remainderman, and without any regard to the person in whose favor it is to be executed, being a mere volunteer, and not a purchaser, creditor, wife, or child." . . . "The question, whether a power is simply such, or a power in the nature of a trust, commonly arises on a power to appoint to a man's children or relations. In *Brown v. Higgs, Lord Eldon* stated the principle of all the cases on this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who had given him an interest intensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it. Thus in *Harding v. Glyn,* Harding devised certain articles to his wife, 'but did desire her, at or before death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of.' The Master of the Rolls held this to be a trust for the relations in default of appointment. He said that it operated as a trust in the wife, by way of power, of naming and apportioning, and her nonperformance of the power should not make the devise void, but the power should devolve on the Court." 2 Sugden on Powers, 159, 160.

Pomeroy states the principle as follows: "Where the power is in trust, A. may have some discretion with respect to the mode in which he shall exercise it, with respect to the amounts distributed among a designated class of beneficiaries, and the like; but he has no discretion as to whether he will or will not exercise it at all. It partakes so much of the nature of a trust, that an obligation rests upon him, and an equitable right is held by the beneficiaries—a right which equity recognizes, and to a certain extent protects; so that if A. does not discharge the duty resting upon him, a court of equity will, to a certain extent, discharge the duty in his stead. A trust power may therefore be defined as follows: It is an authority given to A. to dispose of property of which the legal title is held by B., to or among a specified beneficiary or class of beneficiaries, conferred in such terms that a fiduciary or trust obligation rests upon A. to make the disposition, although he may be clothed with some discretion as to the amounts or shares which he shall confer upon the individuals constituting a class of beneficiaries, or even as to the persons whom he shall select from the class to receive the entire benefit. On the other hand, the beneficiaries may be so specified that no discretion with respect to them exists. When the trust power is of such a nature that the donee-trustee is authorized to dispose of the property among a class, and is clothed with a discretion, a court of equity will not interfere to control that discretion, or interfere with the mode of exercising it, if he does in fact make an appointment. If, however, the donee-trustee fails to act at all, and makes no appointment, it is a settled rule that a court of equity, in enforcing the power on behalf of the beneficiaries, will always decree an equal distribution of the property among all the persons constituting the class." 3 Pomeroy's Equity Jurisprudence (4 ed.), sec. 1002.

And Story says: "It is upon the same ground that if a power of appointment is given by will to a party to distribute property among certain classes of persons, as among relations of the testator, the power is treated as a trust; and if the party dies without executing it, a Court of Equity will distribute the property among the next of kin." Story's Equity Jurisprudence (14 ed.), sec. 1427. See, also, English and American Notes, 21 English Ruling Cases, 412; *Wetmore v. Henry,* 102 N. E. (Ill.), 189; *Cruse v. McKee,* 73 A.D. (Tenn.), 186; *Little v. Bennett,* 58 N. C., 157. In *Bond v. Moore, supra,* it is said that a testamentary direction to convey real property, in the absence of restrictive or qualifying words, when applied to instructions given a trustee, is a direction to convey the full estate vested in him, and the trust consists in the right to have it performed.

A survey of the authorities leads us to this conclusion: Mrs. Henderson's will contains a clear indication of an intention that the share of Charles C. Henderson in the real property devised by the seventh item should go to the children or grandchildren described in item nine if he died "leaving no legitimate issue of his body"; that the testatrix gave him a defeasible estate in fee simple; that the power of appointment conferred upon him was in the nature of an executory trust, *Levy v. Griffis, supra;* that his title was defeated by the happening of the prescribed contingency; and that as he never executed his power of appointment and the testatrix made no limitation over in default of appointment, equity will apportion the subject-matter equally among all the members of the class or classes described in the ninth item of the will.

It may be noted that *Harrison v. Battle, supra, Levy v. Griffis, supra, Bond v. Moore, supra, Taylor v. Eatman,* 92 N. C., 602, and *Hicks v. Ward,* 107 N. C., 392, differ materially from the case under consideration in that they relate to wills or conveyances in which the donee was not directed to execute the power in behalf of any designated class.

Judgment affirmed.

D. B. TEAGUE, TRUSTEE, v. PILOT LIFE INSURANCE COMPANY, T. J. McPHERSON, APPOINTED BY THE COURT TO REPRESENT THE ESTATE OF T. M. McDANIEL, DECEASED, ET AL.

(Filed 11 March, 1931.)

1. **Insurance N a—Creditors of insured may not claim that change of beneficiary was fraudulent as to them.**

A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. C. S., 6464.

2. **Same—In this case held: insured had substantially complied with provisions relating to change of beneficiary and change was effective.**

Where by the terms of a life insurance policy the insured retains the right to change the beneficiary therein by giving written notice to the company and surrendering the policy to it for endorsement, the provision for endorsement by the company is for the benefit of the company and may be waived by it, and where the insured has notified the local agents of the company in writing to change the beneficiary, there remaining only the endorsement by the company to effect the change, but the notification is not received by the company until after the death of the insured, *Held:* the insured has substantially complied with the provisions of the policy relating to the matter, and the change in beneficiary will be given effect.

Appeal by defendants other than Pilot Life Insurance Company, from *Lyon, Emergency Judge,* at September Term, 1930, of Lee. Affirmed.

This is an action to recover on two policies of insurance issued by the defendant, Pilot Life Insurance Company, on the life of T. M. McDaniel, who died at his home near the town of Sanford, in Lee County, on 25 March, 1930.

At the death of the insured both said policies were in full force and effect according to their terms. The amount due and payable on account of both said policies was $3,967.48. Without objection, this sum of money was paid by the defendant, Pilot Life Insurance Company, into the office of the clerk of the Superior Court after the commencement of the action. The said sum of money is held by the said clerk, awaiting the determination of this action as between the plaintiff and the other defendants.

The beneficiary named in each of said policies of insurance, at the date of their issuance, was Charity McDaniel, wife of the insured, T. M. McDaniel. She died about three years prior to the death of her husband. Each of said policies contained a provision as follows:

"Change of Beneficiary. Subject to the interest of any assignee, provided the right to change the beneficiary has not been waived, the insured may change and successively change the beneficiary or beneficiaries by notice to the company, at its home office in writing, accompanied by this policy, such change to become effective only when endorsed hereon by the company. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured, unless otherwise expressly provided herein. If no beneficiary is living at the death of the insured, the proceeds of this policy shall be payable to the executors, administrators or assigns of the insured."

Neither of said policies had been assigned by the insured prior to his death, except to the defendant, Pilot Life Insurance Company, to secure loans made to the insured by said company according to its terms. The insured had not waived the right reserved in each of said policies to change the beneficiary as provided therein. At the death of insured both said policies were in the possession of the defendant, Pilot Life Insurance Company, at its home office in Greensboro, N. C.

On Saturday, 22 March, 1930, the insured, T. M. McDaniel, at his home near the town of Sanford, in Lee County, signed certain paper-writings, addressed to the defendant, Pilot Life Insurance Company, at Greensboro, N. C., by which the said insured requested the said company to change the beneficiary in each of said policies from Charity McDaniel, his wife, to D. B. Teague, trustee, for the use and benefit of his children and certain creditors as set out in his last will and testament of even date with said paper-writings.

The third item of the last will and testament of T. M. McDaniel, executed by him on 22 March, 1930, in so far as same is pertinent to the question involved in this action, is as follows:

"Whereas, I hold certain life insurance policies in Pilot Life Insurance Company of Greensboro, N. C., and my wife has heretofore been the beneficiary of said policies, and she is now deceased, and I desire to change my beneficiary to the end that the proceeds of said policies may be applied to certain purposes, and I have made my friend, D. B. Teague, beneficiary of said policies as trustee, I hereby authorize, empower and direct said D. B. Teague, as beneficiary and trustee of said policies to collect said life insurance after my death, and pay out the proceeds thereof as follows:

(a) Pay my note in the sum of $250, and accrued interest thereon held by the Page Trust Company of Sanford, N. C.

(b) Pay B. H. Jones the sum I am owing him, amounting to about eighty dollars.

(c) Pay my funeral expenses and all expenses incident thereto.

(d) Pay my nurses and doctors' bills that have accrued within three years immediately preceding my death.

(e) To use the residue of my life insurance for the use and benefit of my eight children, according to their needs and with regard to their ages, the youngest of said children to receive preferential treatment according to their needs and tender age in order that they may have an equal chance with my other children, giving and granting unto my said trustee, D. B. Teague, full power and authority to decide and determine what allowance shall be made to each of my said minor children, as well as to my children who are of age, and authorizing him, if he cannot satisfactorily decide upon said question, to call in two additional arbitrators, and the decision of my said trustee and the other additional arbitrators shall be final as to the proper distribution and division among my said children. . . . It is my further wish and desire that the proceeds from my said insurance policies shall be a separate and distinct fund from my other property, and shall be used exclusively for the specific purposes and in the manner set out in this item of my will, and not otherwise."

The paper-writings signed by T. M. McDaniel contemporaneously with the execution of his last will and testament, at his home near Sanford, N. C., were delivered by him to D. B. Teague, who at his request delivered the same to the local agent of the defendant, Pilot Life Insurance Company, at Sanford, about 9 o'clock, on Saturday night, 22 March, 1930, and were forwarded by said local agent, by mail, to the general agent of the defendant company, at Greensboro, N. C. The said paper-writings were received by the said general agent at Greensboro, on 25 March, 1930. They were not delivered to the defendant company at its home office in Greensboro, N. C., until after the death of the insured, on Tuesday, 25 March, 1930. The defendant company has not endorsed on either policy a change of the beneficiary therein, as requested by the insured. According to the terms of each policy, the amount due thereon at the death of the insured was payable to his executor or administrator, the beneficiary named therein having died prior to the death of the insured.

After the death of T. M. McDaniel on 25 March, 1930, his last will and testament executed on 22 March, 1930, was duly probated and recorded. D. B. Teague, named therein as trustee and also as executor of the testator, has duly qualified for the discharge of his duties as such executor. The defendant, Pilot Life Insurance Company, thereafter tendered to the said D. B. Teague its check for $3,967.48, payable to "D. B. Teague, trustee and executor," in settlement of the amount due on the policies issued by said defendant on the life of T. M. McDaniel. This check was declined, and thereafter the plaintiff, D. B. Teague, trustee, as beneficiary in the said policies of insurance, instituted this action. Without objection the defendant, T. J. McPherson, was appointed by the court to represent the estate of T. M. McDaniel, deceased, in this action. Certain unsecured creditors of said estate were also made defendants in this action, without objection. At his death, T. M. McDaniel, left surviving eight children, all of whom, except one, are under the age of twenty-one.

The action was heard on a demurrer, filed by the defendants other than the Pilot Life Insurance Company, to the complaint. By their demurrer said defendants challenge the right of the plaintiff to recover in this action on the facts alleged in the complaint, which are substantially as above stated. The demurrer was overruled.

From judgment overruling the demurrer, and granting leave to the defendants to file an answer to the complaint, said defendants appealed to the Supreme Court.

Gavin, Teague & Byerly and Williams & Williams for plaintiff.
A. A. F. Seawell, T. J. McPherson and Hoyle & Hoyle for defendants.

CONNOR, J. Charity McDaniel, wife of the insured, and beneficiary in each of the policies of insurance issued by the Pilot Life Insurance Company on the life of T. M. McDaniel, her husband, at the date of their issuance, died before the death of the insured. By the terms of said policies, her interest therein at her death vested in the insured, who survived her, subject, however, to his right thereafter to change the beneficiary in accordance with the provisions of said policies. If no change of beneficiary was thereafter made by the insured, at his death the amounts due on the policies were payable, according to the terms of the policies, to the executor or administrator of the insured, to be administered by such executor or administrator as assets of the estate of the insured. In that case, the said amounts would be applied first to the payment of claims of creditors of T. M. McDaniel, deceased.

The contention of the defendants on their appeal to this Court, that if upon the facts alleged in the complaint and admitted by their demurrer, a change of beneficiary in both of the policies of insurance sued on in this action was made by the insured, by which the plaintiff became the beneficiary in both policies, such change was void as to the creditors of the insured, cannot be sustained. It is provided by statute in this State that "when a policy of insurance is effected by any person on his own life, or on the life of another in favor of some person other than himself, having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to the proceeds against the creditors and representatives of the person effecting the insurance." C. S., 6464. By reason of the provisions of this statute, it was held in *Pearsall v. Bloodworth,* 194 N. C., 628, 140 S. E., 303, that where the insured in a policy of life insurance, payable at his death to his estate, procured a change of beneficiary in said policy in accordance with its provisions, by which his wife became the beneficiary, such change was not void as against creditors although at the date of the change made at his request, the insured was insolvent. The insurable interest covered by a policy of insurance on the life of the insured, who applied for and paid the premiums on the insurance, is the interest which the insured has in his own life; the amount due by the terms of the policy is indemnity for the loss which the insured sustains by his death, and is payable to the beneficiary not as an indemnity for his loss by the death of the insured, but as a bounty in accordance with the direction of the insured. *Howell v. Ins. Co.*, 189 N. C., 212, 126 S. E., 603. In the instant case, if the plaintiff is the lawful beneficiary in the policies of insurance issued by the Pilot Insurance Company on the life of the insured, he is entitled to the proceeds of said policies as trustee and not as executor of T. M. McDaniel, deceased. In that case, the creditors of the insured have no interest in the proceeds of the policies.

Defendants contend, however, that on the facts alleged in the complaint, plaintiff is not the beneficiary in said policies, and is therefore not entitled to recover in this action, for the reason that the requests, in writing, of the insured that the beneficiary in said policies be changed from Charity McDaniel, his wife, to the plaintiff, was not received by the Pilot Life Insurance Company, at its home office, until after the death of the insured, and that the change of beneficiary requested by the insured was not endorsed on either policy by said company.

Each policy provides, in effect, that no change of beneficiary by the insured, as authorized by its provisions, shall become effective until notice in writing of such change, accompanied by the policy, has been received by the company, at its home office, and such change has been endorsed on the policy by the company. This provision is manifestly for the protection of the company; in the event of the death of the insured, while the policy is in full force and effect, the company is thus advised as to who is lawfully entitled to the amount due on account of the policy, and may pay such amount to such person, and thereby be discharged of liability under the policy. It has been held by this Court that where there has been a substantial compliance by both the insured and the company with a provision in a policy of life insurance, authorizing a change of beneficiary therein by the insured, the change is effected, and a payment by the company of the amount due under the policy to the new beneficiary, will discharge the company of liability to the original beneficiary. *Wooten v. Order of Odd Fellows,* 176 N. C., 52, 96 S. E., 654. In his opinion in that case, *Walker, J.,* with his usual fullness and accuracy, declares the law to be as follows:

"It is now considered that an insurance company may make reasonable rules and regulations by which the insured may change the beneficiary named in the policy of insurance, or his certificate in case of benefit societies, and that such rules and regulations become a part of the contract. Where the policy or rule of the company, or society, provides that such change may be made in a particular way, the method prescribed should be followed, but if the insured has done substantially what is required of him, or what he is able to do, to effect a change of beneficiary, and all that remains to be done are ministerial acts of the association, the change will take effect, though the formal details are not completed before the death of the insured. It must be understood, however, that some affirmative act on the part of the insured to change the beneficiary is required, as his mere unexecuted intention will not suffice to work such a change. When the right to substitute another beneficiary exists by express reservation, or otherwise, the insured or member of a benefit society, may, without the consent of the original beneficiary, and subject only to the rules of the association, change his beneficiary at will. *Pollock v. Household of Ruth,* 150 N. C., 211, 63 S. E., 940. This is true, because the beneficiary whose right, under the policy or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured. The revocation of his appointment as beneficiary does not require his consent, as the power to displace him is vested solely in the insured, provided he proceeds in substantial compliance with the rules of the association, which may be waived by the company or society, where they are made for its benefit or protection."

The law in other jurisdictions, applicable to the decision of the question presented by this appeal, is stated in 37 C. J., at p. 584, in section 350(b). The text in this section is supported by abundant citations of authoritative judicial decisions. It is there said: "On the principle that equity regards as done that which ought to be done, the courts will give effect to the intention of insured by holding that the change of beneficiary has been accomplished where he has done all that he could to comply with the provisions of the policy, as where he sent a proper written notice or request to the home office of the company, but was unable to send the policy by reason of circumstances beyond his control, as where it has been lost, or was in the possession of another person who refused to surrender it or was otherwise inaccessible, or where he sent both the policy and a proper written notice or request and all that remained to be done were certain formal and ministerial acts on the part of the company, such as the endorsement of the change on the policy, and these acts were either not done at all or were done after the death of insured."

On the facts alleged in the complaint in the instant case, the judgment overruling the demurrer is sustained, on the authority of *Wooten v. Odd Fellows, supra,* and in accordance with principles of law generally recognized as just and equitable. See *State Mutual Life Asso. v. Bessett et al.,* 41 R. I., 54, 102 Atl., 727, L. R. A., 1918c, 961. The judgment is

Affirmed.

MARION MOORE, ADMINISTRATOR OF MRS. SUSAN BELL, v. W. R. BRINKLEY AND WIFE, LILLIE E. BRINKLEY.

(Filed 11 March, 1931.)

1. **Wills B a—Agreement that upon death of obligee the obligor was to be released from liability on note is valid.**

   A written agreement made with consideration contemporaneously with the execution and delivery of notes secured by a mortgage, that the obligor be absolutely released as to the obligee or her estate upon her death is valid.

2. **Appeal and Error J c—Findings of fact supported by evidence are conclusive on appeal.**

   The referee's findings of fact supported by evidence and approved by the trial court are conclusive on appeal to the Supreme Court.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at November Term, 1930, of LENOIR. Affirmed.

This action to recover on notes executed by the defendants, and payable to plaintiff's intestate, and for the foreclosure of the mortgage securing the payment of said notes, was heard on the report of the referee.

The findings of fact and conclusions of law made by the referee were adverse to the contentions of the plaintiff.

Plaintiff's exceptions to certain findings of fact and conclusions of law made by the referee were not sustained by the trial judge. The report of the referee was confirmed in all respects.

From judgment in accordance with the report of the referee, plaintiff appealed to the Supreme Court.

Rouse & Rouse for plaintiff.
Sutton & Greene and Shaw & Jones for defendants.

PER CURIAM. All the findings of fact made by the referee were supported by evidence introduced at the hearing before him. There was, therefore, no error in the refusal of the trial judge to sustain plaintiff's exceptions to the findings of fact. *Kenney v. Hotel Co.,* 194 N. C., 44, 138 S. E., 349.

Nor was there error in the refusal of the trial judge to sustain plaintiff's exceptions to the referee's conclusions of law. Plaintiff's intestate, contemporaneously with the execution by defendants of the notes and mortgage involved in this action, for a valuable consideration, contracted and agreed with the defendants that at her death the defendants should be absolutely released from any and all their indebtedness to her, or to her estate. This contract is valid and enforceable against the plaintiff. *Fawcett v. Fawcett,* 191 N. C., 679, 132 S. E., 796. By the terms of this contract defendants are now the owners of the notes secured by the mortgage, certainly as against the plaintiff.

We find no error in the judgment. It is

Affirmed.

STEPHEN A. MILLER, MINNIE M. ASBURY, HARRIET M. WATTS, AND LOUISE MILLER v. G. L. MILLER, EXECUTOR OF WILL OF JASPER MILLER, DECEASED; G. L. MILLER, INDIVIDUALLY; CORA P. MILLER AND CARRIE A. PETTY.

(Filed 11 March, 1931.)

1. **Trusts A b—In this case held: resulting trust was created to the use of the heirs at law of deceased wife.**

   Where a wife conveys land owned by her to a corporation in consideration of shares of stock of the corporation, and she dies owning such stock, and after her death the corporation is dissolved, and her husband, who was entitled to only one-sixth of her estate as distributee, transfers the stock back to the corporation as consideration for a deed to the land from the corporation to him in his own right, *Held:* a resulting trust attaches to the land in favor of the heirs at law of the deceased wife for the other five-sixths interest.

2. **Limitation of Actions B a—Right of action to enforce resulting trust accrues at date of deed to wrongdoer.**

   Where a husband uses the funds of his deceased wife to purchase land, creating a resulting trust in favor of her heirs, the right of action of the heirs accrues at the date of the execution of the deed to the husband purporting to put title in him in his own right, and the heirs of the wife will be barred from bringing action after ten years from the execution of the deed unless the statute is prevented from running by absence or disability.

3. **Limitation of Actions B e—Action in this case held not barred by ten-year statute, the defendant being out of State part of period.**

   Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the State, the elapsed time is less than ten years, the cause of action is not barred by the ten-year statute. C. S., 411.

4. **Estoppel C a—Estoppel in this case rested solely on grounds that plaintiffs kept silent, and evidence of estoppel held insufficient.**

   Where in an action to enforce a resulting trust the heirs of the first wife of the trustee claim adversely to the interest of the second wife who had loaned her husband money, and there is no evidence tending to show that the second wife loaned the money by virtue of any representations as to the ownership of the land sought to be impressed with the trust, *Held:* the plea of estoppel as against the heirs not participating in the wrongful act rests exclusively on the theory that they stood by in silence, and evidence of estoppel in this case is insufficient to warrant a submission of the issue to the jury.

5. **Estoppel C b—In this case held: son was estopped from setting up interest as heir by participating in breach of trust.**

   Where a husband, in possession of stock in a corporation as administrator of his deceased wife, transfers the stock to the corporation as consideration for a deed to lands from the corporation, and his son, an heir of the deceased wife and an officer of the corporation, signs the deed as such officer and acquiesces in the enjoyment of the property by the husband, *Held:* in an action by the heirs of the deceased wife to impress the property with a resulting trust in their favor, the son is estopped from setting up his interest, he having actually participated in the breach of trust by the husband.

CIVIL ACTION, before *Sink, Special Judge,* at November Term, 1929, of MECKLENBURG.

Minnie Fair Miller, wife of Jasper Miller, owned a certain lot in the city of Charlotte. On 24 February, 1911, she conveyed said land to a corporation known as Jasper Miller & Sons Company, and received in payment for said property certain shares of stock in said corporation. In September, 1915, Minnie Fair Miller died intestate, owning 191 shares of common stock of said corporation out of 200 shares total outstanding issued stock. Her husband, Jasper Miller, qualified as administrator of her estate on 20 September, 1915. At the time of her death Minnie Fair Miller left her surviving, her husband, Jasper Miller, and the following children, to wit, Stephen A. Miller, Minnie M. Asbury, Harriet M. Watts, Carrie Louise Miller, and G. L. Miller. Thereafter on 20 September, 1916, Jasper Miller, administrator, filed a final account as administrator, which is recorded in Record of Settlements 6, at page 52, and is as follows: "Having qualified as administrator of the estate of Minnie Fair Miller, and having paid all claims presented against said estate, and being the sole beneficiary, I have retained in my possession the residue of said estate." At the time said final account was filed all of the children of Minnie Fair Miller were of age. Thereafter proceedings were taken to dissolve the Jasper Miller & Sons corporation, and on 11 May, 1918, the corporation, through Jasper Miller, president, and G. L. Miller, secretary, executed and delivered to Jasper Miller a deed in fee simple for the property in controversy. This deed was also signed by G. L. Miller and Jasper Miller as directors of the company. Jasper Miller surrendered to the corporation the shares of stock formerly owned by Minnie Fair Miller, which apparently constitutes the only consideration for said deed.

Subsequently Jasper Miller married the defendant, Cora P. Miller, and it is admitted in the pleadings that on or about .... June, 1918, the said Jasper Miller removed his residence to the State of Virginia and continuously resided out of the State of North Carolina from June, 1918, until February, 1923.

After the death of Minnie Fair Miller the corporation borrowed $6,000 from the Life Insurance Company of Virginia and executed a mortgage upon the land in controversy to secure said indebtedness. On 20 December, 1919, Jasper Miller borrowed from his wife, the defendant, Cora Miller, the sum of $4,500 and executed to her a note for said amount. It was alleged by the defendant, Cora Miller, that the proceeds of this loan were used to pay off and discharge the deed of trust held by the Life Insurance Company of Virginia.

Jasper Miller died 7 April, 1928, leaving a last will and testament appointing his sons, G. L. Miller and Stephen Alexander Miller, executors of said will. The defendant, Cora Miller, dissented from said will, and her dower has been assigned in other real estate. However, the widow alleges that there was a balance of $2,545 due her on note above referred to, and it is alleged that on 10 September, 1928, she reduced said claim to judgment in the Superior Court of Mecklenburg County. This action was instituted on 5 July, 1929, the plaintiffs claiming in substance that Jasper Miller held said land in trust for his children, and that they were tenants in common thereof. The widow, upon the other hand, asserts and contends that the plaintiffs are estopped from setting up any claim for said land, and that their claims are barred by various statutes of limitation.

At the conclusion of plaintiffs' evidence there was judgment of nonsuit and the plaintiffs appealed.

Walter Clark for plaintiffs.

Bridgers & Orr and Thaddeus A. Adams for Carrie A. Petty and Cora P. Miller.

J. H. McLain for G. L. Miller, executor.

BROGDEN, J. Substantially the case is this: A married woman, Minnie Fair Miller, dies, intestate, leaving a husband and five children. She owns 191 shares of stock in a corporation, of which her husband is president. Her husband qualifies as administrator and files a final report in 1916, stating that he has paid all debts, and that as he is the sole distributee of the personal property of his wife, takes possession of said stock, claiming title thereto in his own right. Thereafter he surrenders the stock to the corporation issuing the same and takes in return therefor a deed in his own name for all real estate owned by the corporation, which is dissolved. In 1918 he remarries and moves to Virginia, remaining there until 1923, when he returns to North Carolina, and dies in 1928, leaving a last will and testament. His second wife dissents from the will and has her dower allotted in property other than that in controversy. At the time of his death he owes his second wife $2,545, for which she took judgment in 1928, after the death of her husband. On 5 July, 1929, the heirs at law and distributees of the first wife, Minnie Fair Miller, institute an action against the second wife, the executor, and another, alleging that they are tenants in common of the real estate which was purchased with the stock owned by their mother.

The following questions of law arise upon the foregoing facts, to wit:

1. What rights, if any, have the children of Minnie Fair Miller in and to the property purchased by her husband, Jasper Miller, with stock belonging to her at the time of her death?

2. Are the claims of the children of Minnie Fair Miller barred by the statute of limitation?

3. Are the children of Minnie Fair Miller estopped to assert any claim in and to said property?

When Jasper Miller qualified as administrator of the estate of his wife, Minnie Fair Miller, he thereupon became the trustee of an express trust. *Grant v. Hughes,* 94 N. C., 231. When he filed his final account on 20 September, 1916, and took the stock belonging to his wife under a claim of right and exclusive ownership for his own benefit, this constituted a disavowal of his trust. *Rouse v. Rouse,* 167 N. C., 208; *Rouse v. Rouse,* 176 N. C., 171. Under the statute of distribution in force at the time said final report was made, Jasper Miller was entitled to only one-sixth of the personal property of his deceased wife. Consequently, during the year 1918, when he took said stock belonging to the children of Minnie Fair Miller and purchased land from the corporation and took title thereto in his own name, a resulting trust was created in favor of the children or distributees of Minnie Fair Miller. This principle of law was expressed in *King v. Weeks,* 70 N. C., 372, where it is written: "A purchase by a man in his own name, with funds in his hands in a fiduciary capacity, creates a resulting trust in favor of those whose money is thus employed; as in case of a trustee, a partner, an agent for purchase, an executor, a guardian, the committee of a lunatic, and the like." *Norton v. McDevit,* 122 N. C., 755; *Springfield Tire Co. v. Lester,* 190 N. C., 411; *Marshall v. Hammock,* 195 N. C., 498. Therefore, under the law, as written, the land in controversy was impressed with a resulting trust in favor of the children of Minnie Fair Miller.

The next question of law requiring consideration is whether the statute of limitation operates as a bar to the claim of said children. It is now firmly established that the ten-year statute of limitation is applicable to the facts disclosed by this record and the statute began to run in September, 1916, when Jasper Miller, administrator of the estate of his wife, disavowed his trust and took possession of her property in his own right and under a claim of exclusive ownership.

McIntosh North Carolina Practice & Procedure, p. 153; *Nunnery v. Averitt,* 111 N. C., 394; *Edwards v. Lemmond,* 136 N. C., 331; *Marshall v. Hammock,* 195 N. C., 498. Thus, the claim of the children of Minnie Fair Miller would be barred by the statute except for the application of C. S., 411. It is admitted that Jasper Miller left the State of North Carolina in June, 1918, and did not return until February, 1923. In other words, he was absent from the State approximately four years and seven months. During such absence the statute was suspended, so that it has run against the claims asserted for a period of approximately five years and four months. Hence, the claims of the children of Minnie Fair Miller are not barred by the statute of limitation.

The last question of law is whether the children or heirs at law of Minnie Fair Miller are estopped to assert any claim to said land. This suit is not between the heirs at law or children of Minnie Fair Miller and Jasper Miller. If so, perhaps a different rule of law would apply. In reality, the suit is an action by the heirs at law or children of Minnie Fair Miller against the second wife and widow of Jasper Miller, who is a creditor of his estate to the amount of $2,545. It does not appear in the record that there are any other creditors or that it is necessary to sell the property in controversy to make assets. There is no evidence tending to show that Cora Miller loaned money to her husband, Jasper Miller, by virtue of any representation made by him as to the ownership of said property. Hence, as to all interested parties, except G. L. Miller, estoppel must rest exclusively upon the theory that the children of Minnie Fair Miller stood by in silence for a period of five years and eight months. A careful examination of the record fails to disclose evidence of estoppel warranting the submission of an issue to a jury. But the defendant, G. L. Miller, stands upon a different footing. In 1918, when the corporation made the deed to Jasper Miller in consideration of stock which he wrongfully held as administrator of his wife, G. L. Miller was secretary-treasurer and director of the corporation. As such secretary he signed a warranty deed in behalf of the corporation, and, therefore, actually participated in the breach of trust committed by Jasper Miller. Consequently he acquiesced in the enjoyment of the property by his father, Jasper Miller, under a warranty deed, which instrument was totally inconsistent with the claim or demand now made by him that said property was impressed with a trust in his behalf. *Mask v. Tiller,* 89 N. C., 423; *Marshall v. Hammock,* 195 N. C., 498.

The result is that Jasper Miller owned one-sixth of said property in his own right, which is subject to the payment of his debts, and as against the claim of the widow or other creditors, G. L. Miller is estopped to assert his claim in and to one-sixth of said property.

Reversed.

MELVIN WILLIAMS v. J. MARVIN THOMPSON AND THE NATIONAL CASUALTY COMPANY.

(Filed 18 March, 1931.)

1. **Master and Servant F i—Findings of fact of Industrial Commission are conclusive when supported by evidence.**

   The findings of fact of the Industrial Commission in a hearing before it are conclusive upon appeal when there is sufficient competent evidence to support the award.

2. **Master and Servant F b—Evidence held sufficient to support finding that disease resulted naturally and unavoidably from accident.**

   Evidence in this case that the loss of applicant's vision occasioned by gonorrhea ophthalmia resulted naturally and unadvoidably from the dropping of gasoline into his eye as a result of an accident arising out of and in the course of his employment, is held sufficient to sustain the award of the Industrial Commission to that effect under the provisions of the act that a compensable injury shall not include a disease in any form except where it results naturally and unavoidably from the accident.

3. **Master and Servant F h—Industrial Commission may appoint physician to determine period of disability, the matter being in fieri.**

   Where the Industrial Commission grants an award for partial loss of vision for such time as the applicant's percentage of loss of vision bears to the total of 100 weeks, section 31(t), the said percentage to be determined by a recognized eye specialist to be selected by the Commission, *Held:* the Industrial Commission has the authority under section 63 of the act to appoint a physician for the purpose, the matter being *in fieri* and the defendants being entitled to notice and hearing before final award, the commission having power to modify an award upon change of condition, section 42.

APPEAL by defendants from *Moore, Special Judge,* at February Term, 1931, of WAKE. Affirmed.

This was a claim under the Workmen's Compensation Act in which the claimant sought compensation for an injury resulting from gasoline and oil and other substance getting into his eye. The defendants denied that the injury complained of resulted naturally and unavoidably from the accident arising out of and in the course of employment.

The case came on for hearing and was heard before Commissioner Wilson, and compensation was awarded by Commissioner Wilson. The case was heard by the full Commission for a review of the findings and award of Commissioner Wilson, and for the purpose of hearing further evidence if found necessary or advisable for the enlightenment of the Commission. The award of Commissioner Wilson was affirmed by the full Commission. Thereupon, the defendants appealed to the Superior Court, and the matter came on for hearing before the Honorable Clayton

Moore, judge presiding over the February Term, 1931, of the Superior Court of Wake County. The Superior Court affirmed the award of the full Commission, and the defendants appealed to the Supreme Court. Notice of appeal was given in open court, and further notice was waived.

It was admitted in open court that the claimant was regularly employed by the defendant, J. Marvin Thompson, at the time of the injury; that the National Casualty Company had insured the compensation liability of employer, J. Marvin Thompson; that the average weekly wage of employee, Melvin Williams, was $16.50; that during the regular employment Melvin Williams got some gas from a carburator in his eye, which irritated his eye; and that there was no default in the notice of this injury or of the hearing.

The judgment of the court below was as follows: "This cause coming on to be heard before his Honor, Clayton Moore, judge holding the February Term, 1931, of Wake Superior Court, upon the appeal by the defendants from the judgment rendered in this cause by the North Carolina Industrial Commission, at Raleigh, N. C., on 23 June, 1930, and being heard, on 12 February, 1931, at chambers in Raleigh, N. C., and the court being of the opinion that there is no error in the opinion and judgment rendered by said Industrial Commission, it is, ordered and adjudged that the judgment rendered by said Industrial Commission be, and it is hereby affirmed."

R. L. McMillan and C. A. Douglass for plaintiff.
Smith & Joyner for defendants.

CLARKSON, J. The defendants contend: Was there sufficient evidence to sustain the finding of fact by the Industrial Commission that plaintiff's injury, to wit, the loss of vision occasioned by gonorrhea ophthalmia, resulted naturally and unavoidably from the dropping of gasoline into his eye?

Public Laws of North Carolina, 1929, ch. 120, known as the North Carolina Workmen's Compensation Act, sec. 2(f), is as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of, and in the course of, the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

We think there was sufficient competent evidence to sustain the findings. In this and other jurisdictions, dealing with the Workmen's Compensation Act, a humane undertaking, the acts have been liberally interpreted. *Rice v. Panel Co.,* 199 N. C., at p. 157.

In the *Rice case, supra,* at p. 157, we find: "Under section 60 the findings of fact by the Commission shall be conclusive and binding." We may add that the rulings of law by the Commission are persuasive and ought to have weight on appeal to this Court. *Moore v. State, ante,* 300.

The findings of fact by the Industrial Commission in a hearing before them is conclusive upon appeal when there is sufficient competent evidence to sustain the award. *Southern v. Cotton Mills, ante,* 165.

Under the facts and circumstances of this case we do not think there is reversible error on the question of burden of proof.

Part of the award of the Commission is as follows: "That plaintiff is entitled to 60 per cent of his average weekly wage of $16.50 ($9.90 per week) for such time as his percentage of loss of vision bears to the total of 100 weeks for the partial loss of vision in his left eye, as provided for in section 31, subsection (t), said percentage to be determined by a recognized eye specialist to be named by the Commission."

The defendants object to the following part of the above award "said percentage to be determined by a recognized eye specialist, to be named by the Commission."

Section 63 of the act is as follows: "The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto," etc.

By section 46 it is provided in the act, upon change of condition, Commission may modify award. We think this element *in fieri* and before final award defendants would be entitled to notice and hearing. The judgment of the court below is

Affirmed.

INTERNATIONAL AGRICULTURAL CORPORATION AND N. L. GEORGE, TRUSTEE, v. N. M. JOHNSON.

(Filed 18 March, 1931.)

Wills E b—In this case held: devise did not convey indefeasible fee.

A devise of lands to a certain son of the testator "and his bodily heirs," and if no bodily heirs then to the testator's heirs and assigns does not pass to the son an indefeasible fee-simple title to the lands described, the condition referring to the son's death with bodily heirs him surviving. *Smith v. Brisson,* 90 N. C., 284, cited and applied. *Daniel v. Bass,* 193 N. C., 294, cited and distinguished.

APPEAL by plaintiffs from *Devin, J.,* at November Term, 1930, of SAMPSON. Affirmed.

This is a controversy without action. Jacob H. Spell died in November, 1904, leaving a will containing the following clauses:

"Item 2. I reserve for my wife, Martha J. Spell, her natural life time interest for her support so long as she remains my widow.

"Item 3. I give and bequeath to my son, John Morris Spell, all my real and personal property, and his bodily heirs, and if no bodily heirs then to my heirs and assigns."

At the time of his death the testator was seized in fee simple of three tracts of land containing respectively 100 acres, 50 acres, and 33 acres. He was survived by his widow who died about ten years ago and an only son John Morris Spell, the only devisees named in the will. John Morris Spell had no children when his father died, being an unmarried youth, but in 1913 he married. Of this marriage six children were born, five of whom are now living, ranging in age from six to fifteen.

On 24 November, 1926, John Morris Spell executed and delivered to the plaintiff, International Agricultural Corporation, his promissory note in the sum of $3,267.64, due 1 January, 1927, bearing interest from date, at six per cent, no part of which has been paid except a small portion thereof, reducing the face value of said note to approximately $3,000. For the purpose of securing the payment of the note, John Morris Spell and his wife executed and delivered to N. L. George, trustee, a deed of trust conveying the three tracts of land above described, which are fully described by metes and bounds in the deed of trust, which is recorded in the office of the register of deeds of Sampson County.

The deed of trust is the first lien of record on the lands described therein. The defendant, N. M. Johnson, contracted and agreed in writing to purchase the note and deed of trust for the sum of $2,500, and the plaintiffs contracted and agreed to sell, transfer and convey without recourse to the defendant the note and deed of trust upon full payment of the agreed price, this contract being dependent upon the plaintiffs' showing that the said John Morris Spell was seized of a good and indefeasible title to the lands described in said deed of trust, subject only to the lien created by the deed of trust to N. L. George, trustee, above mentioned.

The plaintiffs have tendered to the defendant the note and deed of trust duly transferred as set forth in the contract and demanded payment to the plaintiff, the International Agricultural Corporation, of the sum of $2,500, and the defendant, N. M. Johnson, has refused to accept the note and security or to pay the sum of $2,500 upon the ground that under the will of Jacob H. Spell, his son, John Morris Spell, did not receive an indefeasible title in fee simple to said land described in said deed of trust. The defendant is ready, able and willing to perform the contract.

Upon the foregoing facts it was adjudged that John Morris Spell did not acquire an indefeasible title in fee under the will of his father. The plaintiffs excepted and appealed.

Clifford & Williams for plaintiffs.
R. L. Godwin for defendant.

ADAMS, J. Since Martha J. Spell, the testator's widow, died several years ago the second item of the will may be disregarded. The controversy involves the construction of the third clause—the devise to John Morris Spell, the testator's son. What estate did he take?

The case of *Smith v. Brisson,* 90 N. C., 284, presented for review the trial court's interpretation of the following provision in a deed executed by Rowland Mercer, Sr., to Rowland Mercer, Jr.: "For and in consideration of the natural love and affection I have for my son, Rowland Mercer, and the further sum of one dollar to him in hand paid, the receipt of which is hereby acknowledged has given, granted, bargained, sold and conveyed, and do hereby give, grant, bargain, sell and convey to the said Rowland Mercer and the heirs of his body, and if the said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer, all that tract of land," described as in the complaint.

In an opinion delivered by *Ashe, J.,* the Court said that the deed should be construed as if it read, "To the said Rowland Mercer and the heirs of his body, and if the said Rowland Mercer should die not having such heirs living at the time of his death, the said land shall go to the children of my son James A. Mercer." It was held that the limitation over was good.

A similar construction was given to conveyances in *Williams v. Blizzard,* 176 N. C., 146, and in *Willis v. Trust Co.,* 183 N. C., 267. These decisions are controlling in the present case. The language construed in the cases cited is easily distinguishable from that which was used in the will set out in *Daniel v. Bass,* 193 N. C., 294. Judgment

Affirmed.

LOOSE-WILES BISCUIT COMPANY v. TOWN OF SANFORD, ET AL.

(Filed 18 March, 1931.)

Taxation E b—In this case remedy to test validity of ordinance imposing license tax was by payment and action to recover, and not injunction.

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling bakery products therein, and provides that its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, C. S., 7979, and equity will not enjoin the town from executing its threat to arrest the agent of the plaintiff every time the agent distributed bakery products in the town in violation of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief.

APPEAL by defendants from *Lyon, Emergency Judge,* 3 October, 1930. From LEE.

Civil action to restrain the defendants from enforcing an alleged invalid ordinance of the town of Sanford.

The plaintiff is a New York corporation engaged in the manufacture and sale of bakery products. It maintains a warehouse and branch office in the city of Greensboro, N. C., from which it supplies the trade in the surrounding territory, including the town of Sanford, on orders sent in by traveling salesmen, but it sells only to authorized, licensed merchants in the towns and cities of the State.

On 23 May, 1930, the town of Sanford passed an ordinance providing that "every person, firm, corporation, or association, which shall sell or deliver at wholesale, and/or peddle bread, or any other bakery products, within the corporate limits of the town of Sanford, shall pay to the town of Sanford an annual license tax of $100," etc. Violation of the ordinance is made a misdemeanor.

The plaintiff being advised that said ordinance was void, and inapplicable to its business, ignored its provisions and declined to pay the tax sought to be imposed thereby; whereupon its agent was arrested for delivering bakery products in the town of Sanford, found guilty and bound over to court. Plaintiff has been informed that its agent will be arrested every time he comes to Sanford to deliver goods, unless a proper license is secured therefor.

Plaintiff sues to enjoin the threatened, repeated arrests of its agent.

From an order continuing the injunction to the final hearing, the defendants appeal, assigning error.

A. A. F. Seawell for plaintiff.
Williams & Williams and J. C. Pittman for defendants.

STACY, C. J. The appeal presents the single question whether the facts of the instant case bring it within the principle announced in *Thompson v. Lumberton,* 182 N. C., 260, 108 S. E., 722, or the exception to the general rule as applied in *Advertising Co. v. Asheville,* 189 N. C., 737, 128 S. E., 149. We have concluded that the case is controlled by the decisions in *Thompson v. Lumberton, supra, Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469, *Paul v. Washington,* 134 N. C., 363, 47 S. E., 793, *Rosenbaum v. New Bern,* 118 N. C., 83, 24 S. E., 1, and others of like import.

The general rule is, that equity will not interfere by injunction to test the validity of an alleged unlawful or invalid municipal ordinance. *Wardens v. Washington,* 109 N. C., 21, 13 S. E., 700; *Scott v. Smith,* 121 N. C., 94, 28 S. E., 64; *Cohen v. Comrs.,* 77 N. C., 2.

There is an exception to this general rule, however, as well established as the rule itself, that equity will enjoin the threatened enforcement of an alleged unconstitutional law when it is made manifest that otherwise property rights or the rights of persons would suffer irreparable injury. *Advertising Co. v. Asheville, supra.* See, also, concurring opinions in *Turner v. New Bern, supra,* and *R. R. v. Goldsboro,* 155 N. C., 356, 71 S. E., 514.

The plaintiff could hardly regard the payment under protest of a $100 tax, with adequate legal remedy to recover it back, if unlawful, as an irreparable injury to its business. C. S., 7979; *R. R. v. Comrs.,* 188 N. C., 265, 124 S. E., 560.

Error.

FIRST PRESBYTERIAN CHURCH OF RALEIGH, N. C., Successor to the PRESBYTERIAN CHURCH OF RALEIGH, N. C., Acting by and Through its Duly Appointed Trustees, J. R. YOUNG, R. C. AUNSPAUGH and HAL V. WORTH, v. SINCLAIR REFINING COMPANY.

(Filed 18 March, 1931.)

1. **Deeds and Conveyances C c—Deed not providing for reversion or re-entry will ordinarily pass fee and not defeasible fee.**

A conveyance of land to the trustees of a church organization and their successors, with *habendum* to have and hold to the use of the said church provided and upon condition that the church or congregation continue in communion with the national organization and remain subject to its authority and general control of its general assembly, it appearing that the local organization and its successors had continued in the required communion with the national organization, etc., *Held:* the provisions in the *habendum* will not ordinarily be construed as qualifying the fee or as a condition subsequent that would defeat the fee, there being no provision giving the grantors the right to reënter upon condition broken, nor any language showing an intent that the property should revert to the grantor.

2. **Landlord and Tenant B a—In this case held: lessor's title was sufficient to support lease, and the contract was valid.**

Where a church leases a part of its property by a lease contract wherein it warrants that it has the indefeasible fee to the property, and the lessee refuses to accept the instrument on the ground that the title of the church was defeasible in that its deed contained a provision in the *habendum* that the property should remain to its use provided and on condition that it remain in communion with the national organization, *Held:* if the provision in the *habendum* be construed as qualifying the fee or as a condition subsequent, the possibility of the breach by the church is so remote that the condition should be disregarded, and the lease will be upheld, the lessee being protected therein by covenants if the fee of the church should be terminated to the damage of the lessee.

3. **Landlord and Tenant H b—Lessee is not liable for proper application of rent by trustees of lessor.**

Where a church, acting through its duly appointed trustees, executes a valid lease of part of its lands the lessee is not required to see to the proper application of the money it pays as rent under the terms of the lease. *Denson v. Creamery Co.*, 191 N. C., 198, cited and applied.

APPEAL by defendant from *Moore, Special Judge,* at January Term, 1931, of WAKE. Affirmed.

This is a controversy without action, submitted to the court on a statement of facts agreed. C. S., 626. The agreed facts are substantially as follows:

The First Presbyterian Church of Raleigh, North Carolina, as successor in name to the Presbyterian Church of Raleigh, is now the owner of a certain lot or parcel of land situate in the city of Raleigh, Wake County, North Carolina, which is described as follows:

"Beginning at a point, the southwest corner of Dawson and Hargett streets, in the city of Raleigh, running thence with the south side of Hargett Street west one hundred and seven (107) feet to an eight (8) foot alley; thence south with the east line of said alley one hundred and five (105) feet to a stake in the southeast corner of said alley; thence east one hundred and seven (107) feet to a stake on the west side of Dawson Street; thence north with the western line of Dawson Street to the point of beginning; said premises being known as the 'Manse Property.'"

The said First Presbyterian Church of Raleigh holds title to the said lot of land, as successor in name to the Presbyterian Church of Raleigh, under a deed executed by John Devereux and his wife, Frances Devereux, dated 20 June, 1843, and duly recorded in the office of the register of deeds of Wake County, in Book No. 15, at page 563. By their said deed, the said John Devereux and his wife, Frances Devereux, conveyed the land described therein, which includes the above described lot or parcel of land, to William F. Clark, George Simpson and Jesse Brown, members and trustees of the Presbyterian Church of Raleigh, North Carolina, "to have and to hold the same with all the buildings thereon, and the appurtenances unto them, the said William F. Clark, George Simpson and Jesse Brown, members and trustees aforesaid, and their heirs and successors to and for the sole use and benefit forever of the said Presbyterian Church or congregation whereof they are trustees and members as aforesaid, to be used as a place of residence by and for the pastor of the said church for the time being and other proper uses of the said church or congregation—provided always and upon condition nevertheless that the said Presbyterian Church or congregation of Raleigh, do and shall at all times continue (as now) in communion with the Presbyterian Church in the United States of America, subject to its proper Presbytery and Synod and other ecclesiastical officers and authorities under the ultimate and general control of the General Assembly of the said church known (as aforesaid) as the Old School General Assembly and do and shall in all things conform to the doctrine, discipline and form of government of the said Presbyterian Church in the United States under the jurisdiction of the said (Old School) General Assembly."

The Presbyterian Church of Raleigh entered into possession of the land conveyed by said deed at the date of its execution, and thereafter used the building erected thereon as a residence for its pastor until some time during the year 1877, when the name of said church was changed to the First Presbyterian Church of Raleigh, N. C. From 1877 to 1928, the First Presbyterian Church of Raleigh, N. C., used the said building and lot as the residence of its pastor. In 1928 the said church abandoned the said building and lot as a residence for its pastor, and since said abandonment has rented the same, applying the rents and income to the uses of said church. The said building and lot, by reason of changed conditions and surroundings, resulting from the development of the city of Raleigh, had become undesirable and unsuited for use as a residence for the pastor of said church.

The First Presbyterian Church of Raleigh, N. C., has at all times been in communion with the Presbyterian Church in the United States of America, or its successor, and is now in such communion. It is now and has been at all times since the execution of the deed by John Devereux and his wife, Frances Devereux, conveying the land described therein to the trustees of said church, subject to its proper Presbytery and Synod and other ecclesiastical officers and authorities, and under the ultimate and general control of the General Assembly of the said church, known as the Old School General Assembly, or its successor. It has at all times, and in all things conformed to the doctrine, discipline and form of government of the Presbyterian Church in the United States, under the jurisdiction of the said Old School General Assembly or its successor, and does now so conform.

On or about 15 August, 1930, the trustees of the First Presbyterian Church of Raleigh, under and by virtue of authority vested in them by said church, entered into a contract with the Sinclair Refining Company, a corporation engaged in the business of operating filling stations for the sale of gasoline, kerosene and oils, by which the said church agreed to lease to the said company the lot or parcel of land above described upon the terms and conditions set out in the form of lease embodied in the statement of facts agreed. Thereafter, the trustees of said church, acting under and by virtue of authority duly vested in them, executed and tendered to the said Sinclair Refining Company a lease in writing, which in form is in full compliance with the terms and conditions of said contract. The said lease contains a clause as follows:

"Lessor (The First Presbyterian Church of Raleigh, North Carolina) warrants that it has an indefeasible title in fee simple to said demised premises, free and clear of all liens and encumbrances whatsoever, and lessor further warrants that it will place lessee (Sinclair Refining Company) in possession of said premises on the execution of this lease free from the claims of all parties in possession and third parties claiming rights in and to the use of said premises, and shall reimburse and hold lessee harmless for all damages and expenses which lessee may suffer by reason of any restrictions, encumbrances or defect in said title, and by reason of breach of the covenant or quiet enjoyment in and to the use of the demised premises during the term of this lease."

The question in difference between the parties to this controversy, which might be the subject of a civil action, is, whether on the statement of facts agreed submitted to the court, the First Presbyterian Church of Raleigh, North Carolina, is the owner in fee simple of the lot or parcel of land described in the proposed lease, and as such owner has the right to lease the same for the purposes, and on the terms and conditions set out therein.

Upon consideration of the agreed facts as set out in the statement submitted by the parties to this controversy, the court was of opinion that the First Presbyterian Church of Raleigh, N. C., is now the owner in fee simple of the lot or parcel of land described in the proposed lease, holding the same under good and indefeasible title, and has the right to lease the same for the purposes and on the terms and conditions set out therein.

From judgment in accordance with this opinion, defendant appealed to the Supreme Court.

Barwick & Leach for plaintiff.
Wm. B. Jones for defendant.

CONNOR, J. The First Presbyterian Church of Raleigh, N. C., as successor in name to the Presbyterian Church of Raleigh, is now the owner of an estate in fee simple in the lot or parcel of land described in the proposed lease executed by the trustees of said church, and tendered by them to the Sinclair Refining Company, in compliance with the contract between said church and said company, under the deed executed by John Devereux and his wife, Frances Devereux, set out in full in the statement of facts agreed, which was submitted to the court, in accordance with the provisions of C. S., 626. The land described in said deed, which includes the lot or parcel of land described in said proposed lease, is conveyed thereby to the trustees of the Presbyterian Church of Raleigh, their heirs and successors. The question presented for decision by this appeal is whether the said fee-simple estate is qualified or defeasible by virtue of the language in the habendum clause of said deed. The court below was of opinion that said fee-simple estate is not so qualified, and is indefeasible, notwithstanding said language. In this opinion there was no error. The opinion is sustained by authoritative decisions of this Court. *Tucker v. Smith,* 199 N. C., 502, 154 S. E., 826; *Cook v. Sink,* 190 N. C., 620, 130 S. E., 714; *Shields v. Harris,* 190 N. C., 520, 130 S. E., 189; *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18, and many cases cited in the opinions therein.

The principles of law on which the decision in each of these cases rests are well settled. In *Hall v. Quinn, supra,* it is said that a clause in a deed will not be construed as a condition subsequent, which qualifies the estate conveyed thereby, and the breach of which will defeat said estate, unless the clause expresses in apt and appropriate language the intention of the parties to that effect *(Braddy v. Elliott,* 146 N. C., 578, 60 S. E., 507) and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. Where, as in the instant case, there is no language showing an intent that the property shall revert to the grantor, his heirs or assigns, or that the grantor, his heirs or assigns shall have the right to reënter, the language used in the deed, with reference to the use by the grantee, his heirs or assigns of the property conveyed thereby, will not ordinarily be construed as qualifying the estate granted, or as imposing a condition subsequent which may result in a defeat of the estate. "Conditions subsequent are not favored by the law, and are construed strictly because they tend to destroy estates and the rigid execution of them is a species of *summum jus,* and in many cases, hardly reconcilable with conscience." 4 Kent's Com. (12 ed., 129); *Church v. Bragaw,* 144 N. C., 126, 56 S. E., 688; *Hinton v. Vinson,* 180 N. C., 393, 104 S. E., 897.

Even if the language used in the deed in the instant case, with reference to the relationship of the Presbyterian Church of Raleigh (the predecessor in name of the First Presbyterian Church of Raleigh, N. C.), to the Presbyterian Church in the United States of America, and the Old School General Assembly of said church, is construed as a condition subsequent, by the breach of which the fee-simple estate may be defeated, in view of all the facts agreed contained in the statement submitted to the court, such breach is so improbable that for the purposes of this decision, such condition subsequent should be disregarded. It is too remote to affect the title of the church to the lot or parcel of land described in the lease. In the highly improbable event of a breach of this condition, resulting in a defeat of the estate of the church in said lot or parcel of land, the lessee is protected from loss by the covenants in the lease.

It is suggested that if the lessee, the Sinclair Refining Company, is required to accept the proposed lease, it will further be required to see to the application of the rents paid by it to the church. This suggestion is not well founded. See *Denson v. Creamery Co.*, 191 N. C., 198, 131 S. E., 581.

There is no error in the judgment. It is

Affirmed.

E. J. WELLONS v. W. C. LASSITER AND WIFE, ROSELLA LASSITER.

(Filed 18 March, 1931.)

1. **Courts A c—Superior Court has authority to hear appeal from order of clerk striking out defendant's answer as sham and frivolous.**

   The Superior Court has the power and authority to determine on appeal the order of the clerk of the court in refusing a motion under C. S., 510 to strike out the defendant's answer on the ground that it was sham and frivolous. C. S., 536.

2. **Judgments K d—Where judgment is irregular the remedy is by motion in original cause, where erroneous the remedy is by appeal.**

   The action of the judge of the Superior Court in passing upon the judgment of the clerk of the court in refusing to strike out the defendant's answer as sham and frivolous, C. S., 510, is upon a matter of law requiring exception thereto and an appeal to the Supreme Court, and does not come within the rules of practice and procedure regulating the remedy from irregular judgments or those contrary to the course and practice of the courts, and C. S., 600, relating to mistake, surprise, or excusable neglect does not apply.

3. **Judges A a—Superior Court judge may not review judgment of another Superior Court judge on matter of law.**

   A judge of the Superior Court has no authority to review upon matters of law a judgment rendered by another Superior Court judge, the procedure being by exception and appeal to the Supreme Court, and a judgment by one judge of the Superior Court in attempting to review the judgment of another judge will be treated as a nullity, and the former judgment from which no appeal is taken will remain effective.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at November Special Term, 1930, of JOHNSTON. Reversed.

This is an action brought by plaintiff against the defendants to recover on certain bonds executed by defendants to plaintiff secured by mortgage to plaintiff on certain lands.

The complaint alleges, in part: "That there is now justly owing to the plaintiff by the defendants the sum of $89.92 with interest from 2 February, 1929, and the further sum of $4,052.00, with interest from 1 November, 1927, until paid. Wherefore, plaintiff prays he recover judgment for the sum of $89.92, with interest from 2 February, 1929, and for the further sum of $4,052.21, with interest from 1 November, 1927, and that said sum be adjudged and declared to be a specific lien upon the lands described herein and that a commissioner of the court be appointed and directed to advertise and sell said lands in accordance with law and to apply the proceeds therefrom to the satisfaction of this judgment and for such other and further relief as to the court may appear just and proper, and for the costs of this action to be taxed by the clerk."

The defendants admitted the execution of the note and mortgage, pleaded payment, etc. Summons was duly issued and served on defendants on 13 February, 1930. The complaint was filed the same day, and within the time allowed by an order extending time to file answer; defendants filed an answer on 24 March, 1930. Thereafter, on 7 March, 1930, the plaintiff filed a motion in the cause before the clerk of the Superior Court praying the court to strike out the answer for the reason it was a sham and frivolous answer. Upon the cause coming on to be heard before the clerk the motion of the plaintiff was denied and he gave notice of appeal and appealed to the judge of the Superior Court, holding courts of the Fourth Judicial District at Smithfield, at term time. At the April Term of Johnston Superior Court said cause came on for hearing before his Honor, W. L. Small, judge presiding, and was heard and the motion of the plaintiff was allowed and judgment entered upon the pleadings as appear in the record.

The judgment is as follows: "This cause coming on to be heard and being heard before the undersigned judge upon motion of the plaintiff to strike out the answer of the defendants as being frivolous, and said motion being allowed, and it appearing that the defendants are jointly and severally indebted to the plaintiff in the sum of $4,152.13 upon the notes and mortgage set out and described in the complaint filed herein over and above all offset and credits thereon, it is therefore considered, ordered and adjudged that the plaintiff be and he is hereby given judgment against the defendants jointly and severally in the sum of $4,152.13, with interest on $4,052.21 from 1 November, 1927, and interest on $89.92 from 2 February, 1929, together with the costs of this action to be taxed by the clerk. It is further considered, ordered and adjudged that said sum be and the same is hereby declared to be a specific lien upon the lands described in the complaint and recorded in the registry of Johnston County, in Book 208, page 83, and the plaintiff is authorized and empowered to advertise and sell said lands under the powers contained in said mortgage at any time he may desire to do so and apply the proceeds derived from such sale to the payment of the costs of this action and the balance, if any, to the satisfaction of this judgment in so far as said funds may extend, and any balance after the satisfaction of the judgment to the defendants as their interest may appear."

The judgment was rendered at April Term, 1930. On 16 June, 1930, defendant, W. C. Lassiter, filed affidavit and among other things stated: "That the plaintiff made motion on 19 April, 1930, before the clerk of the Superior Court to set aside the answer and for judgment, which was heard before said clerk and the motion denied by an order of said date, which order is duly recorded in the Book of Orders and Decrees No. 5, at page 221, a copy of which order is attached and made a part of this affidavit, and that by said order it was adjudged that the defendants were entitled to a trial by jury on the issues raised in the pleading and the cause was retained on the civil docket for trial in term time. . . . That notwithstanding, the plaintiff commenced said action in the Superior Court as above set out to foreclose said mortgage and that the same is now pending in the Superior Court, the plaintiff, on 14 May, 1930, advertised the lands described in said mortgage to be sold at the courthouse door in Smithfield on Monday, 16 June, 1930, and is threatening to sell said lands. Wherefore, the affiant prays that an order to show cause issue to the said E. J. Wellons, and that pending the hearing of said order that he be enjoined from selling the lands as advertised in said notice of sale."

The cause was continued from time to time by consent, and at November Special Term, 1930, the following order vacating the judgment was rendered by Judge Lyon: "The above-entitled cause coming on to be heard, and being heard upon motion of the defendants to vacate and set aside the judgment heretofore entered in the above-entitled cause by Honorable Walter L. Small, judge presiding, at the June, 1930, Special Term of this court, and it being found from inspection of the pleadings that the answer raises issues of fact which should have been submitted to the jury, and it further appearing that said judgment was entered without the intervention and verdict of a jury: It is therefore adjudged that said judgment was irregular and the same is hereby ordered vacated and set aside, and the case is ordered placed upon the civil issue docket for trial."

The plaintiff excepted to the judgment, assigned error and appealed to the Supreme Court.

E. J. Wellons in propria persona.
Parker & Lee and Ed. F. Ward for defendants.

CLARKSON, J. The plaintiff in apt time before the clerk made a motion to strike out defendants' answer for the reason that it was sham and frivolous under C. S., 510, which is as follows: "Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose." This motion was denied by the clerk and the plaintiff excepted and appealed to the Superior Court. The cause being on appeal in the Superior Court, the court below had the power and authority to hear the matter. C. S., 536. *Washington v. Hodges, ante,* at p. 370.

The court below struck out the answer of defendants as being frivolous and gave judgment for plaintiff that the sum be a specific lien on the land, and authorized the same to be sold. This judgment was rendered at April Term, 1930. The record discloses that no exception or appeal was taken to this judgment.

On 16 June, 1930, defendant, W. C. Lassiter, filed an affidavit and made motion and prayed that the sale of the land be enjoined. At November Special Term, 1930, the court below made an order and adjudged that the judgment rendered by Judge Small was irregular and set same aside. From this order vacating the judgment the plaintiff appeals to this Court. We think the judgment of Judge Small, if erroneous, the defendants should have appealed from same. This they did not do, and the judgment of Judge Lyon should be reversed.

A "void judgment" is one that has merely a semblance without some essential elements, as want of jurisdiction or failure to serve process or to have party in court, while an "irregular judgment" is one entered contrary to course and practice of court, and an "erroneous judgment" is one rendered contrary to law. *Duffer v. Brunson,* 188 N. C., 789.

"Erroneous judgment" is one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles. *Finger v. Smith,* 191 N. C., 818.

"If a judgment is irregular the remedy is by motion in the cause made within a reasonable time; if erroneous, the remedy is by appeal." *Finger v. Smith, supra,* at p. 820, or *certiorari.*

C. S., 600, relating to mistake, surprise and excusable neglect, has no application. *Foster v. Allison Corp.,* 191 N. C., 166.

In *Caldwell v. Caldwell,* 189 N. C., at p. 809, we find: "A decision of one judge of the Superior Court is not reviewable by another judge.

Dockery v. Fairbanks, 172 N. C., 529. The power of one judge of the Superior Court is equal to and coördinate with that of another. A judge holding succeeding terms of a Superior Court has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous." *Phillips v. Ray,* 190 N. C., 152.

In *Baker v. Corey,* 195 N. C., at p. 302, is the following: "But irregularity alone is not sufficient. In *Duffer v. Brunson,* 188 N. C., 789, it is said: 'It is essential for the moving party to show not only that he has acted with reasonable promptness, but that he has a meritorious defense against the judgment. As suggested in *Harris v. Bennett,* 160 N. C., 339, 347, "Unless the Court can now see reasonably that defendants had a good defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?" *Hill v. Hotel Co., ante,* 586; *Gough v. Bell,* 180 N. C., 268; *Rawls v. Henries,* 172 N. C., 216; *Glisson v. Glisson,* 153 N. C., 185.' " *Sutherland v. McLean,* 199 N. C., 351.

For the reasons given, the judgment of the court below is
Reversed.

THE SCOTT REGISTER COMPANY, INC., v. T. W. HOLTON.

(Filed 18 March, 1931.)

1. **Execution E b—In this case held: remedy of defendant to stay execution was by motion in the cause in county from which writ was issued.**

   Where execution against the property of a defendant is issued under a judgment, the court issuing the execution may, in proper instances, withdraw the process itself, or stay it by granting a supersedeas, and where the defendant has not applied for this remedy but seeks to enjoin the execution issued to another county against his property therein, on motion made by special appearance, the proceedings in the county other than that in which the judgment was rendered will be dismissed.

2. **Same—Remedy against execution will not ordinarily be granted where property has been sold and is in hands of innocent purchaser.**

   The Superior Court rendering a judgment will not grant the remedy of withdrawing or staying its execution issued thereunder against an innocent purchaser at the execution sale or one who is not a party to the proceedings.

APPEAL by defendant from *Small, J.,* 5 September, 1930. From CRAVEN. Affirmed.

At March Civil Term, 1929, of the Superior Court of Guilford County, N. C., plaintiff recovered judgment against the defendant for

$750 and interest. The plaintiff by claim and delivery proceedings in the action took possession of the property mentioned in the complaint: One No. 88 10-foot Oreole Non-illuminated Case complete with Frigidaire. The judge appointed a commissioner to sell said property.

Plaintiff contends that a sale was duly made and in the record acknowledges receipt of $300 from the sale. This judgment was duly docketed in Craven County, N. C., on 10 April, 1929. Thereafter, on 9 May, 1930, the clerk of the Superior Court of Guilford County, N. C., issued an execution to the sheriff of Craven County, setting forth the judgment with no credit on it and commanding the sheriff "to satisfy the said judgment out of the personal property of the said defendant within your county; or if sufficient personal property cannot be found, then out of the real property in your county belonging to such defendant on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be," etc.

Thereafter on affidavit the defendant applied to Judge Small, holding the Superior Court in Craven County, N. C., for an injunction, alleging several matters. The plaintiff entered special appearance and moved to dissolve the temporary injunction theretofore issued. On 5 September, 1930, Judge Small rendered the following judgment:

"This cause coming on to be heard on the pleadings filed by the defendant, T. W. Holton, and it appearing to the court and the court finds as facts that no summons issued and no complaint was filed in the cause by the defendant, Holton; that the affidavit of the defendant contained no allegation of irreparable damage nor any allegation of the insolvency of the plaintiff, and that the affidavit upon which the writ was predicated was not verified as the law requires for the complaint in an action, and finds that execution issued out of Guilford County and not Craven, and no motion in the cause was made in Guilford: It is, therefore considered, ordered and adjudged, after due consideration for the reasons above set out and found as facts, upon motion of plaintiff's counsel by special appearance, and argument of counsel for both sides, that the temporary injunction issued in the above-entitled cause be, and the same is, hereby dissolved, and the action dismissed, at defendant's cost."

The defendant excepted and assigned error and appealed to the Supreme Court.

Ernest M. Green, special appearance for plaintiff.
Lon J. Moore for defendant.

CLARKSON, J. We can see no error in the judgment of the court below. It has been said that an execution "is the end and life of the law," and it is to give effect to the judgment on which it is issued.

Under C. S., 669, it is issued from and returned to court of rendition. Under the facts and circumstances of this case, we think defendant's remedy was a motion in the cause before the clerk of the Superior Court of Guilford County, N. C., where the judgment was rendered. On the record, as it appears at the present time, we see no reason why defendant cannot now pursue that remedy.

Nash, J., in *Greenlee v. McDowell,* 39 N. C., at p. 484, said: "The Court can, and, upon a proper case made, supported by affidavits, will withdraw the process itself, or stay an execution by granting a supersedeas."

In *Williams v. Dunn,* 158 N. C., at p. 401-2, we find: "The right to recall an execution by notice and motion in the court from which same was issued is usually the proper method of obtaining redress for irregularities affecting its validity. *Aldridge v. Loftin,* 104 N. C., 122; *Beckwith v. Mining Co.,* 87 N. C., 155; *Faison v. McIlwaine,* 72 N. C., 312; *Foard v. Alexander,* 64 N. C., 69. The remedy will not usually be entertained or allowed after a sale had as against an innocent purchaser who was not a party to the proceedings, but against a party of record or a purchaser who buys with full notice, on motion made in apt time and in furtherance of right, both writ and sale may be quashed. *(Saunders v. Ruddle,* 17 and 18 Ky., 139; *Van Campen v. Snyder,* 4 Miss., 66), and by weight of authority, even after writ returned, 8 Pl. and Pr., p. 470, citing *Meyer v. Baker,* 13 W. Va., 805, and other cases." *Williams v. Dunn,* 163 N. C., 206; *Banks v. Lane,* 171 N. C., 505.

For the reasons given, the judgment of the court below is
Affirmed.

CITIZENS NATIONAL BANK v. FLORIDA-CAROLINA ESTATES, INC., AND H. WALTER FULLER.

(Filed 18 March, 1931.)

1. **Trial B c—Exception to admission of evidence will not be sustained where evidence of identical import has been admitted without objection.**

   Exceptions to the admission of certain evidence upon the trial will not be sustained when testimony of substantially identical import has been introduced without objection.

2. **Trial E c—Exception to charge on ground that it over-emphasized issue is not sustained under facts of this case.**

   Where the determination of the controversy admittedly depends upon the jury's answer to an issue of fraud, exception to the charge of the court on the grounds that it unduly emphasized this issue will not be sustained on appeal when the record does not disclose that the trial judge abused his discretion in the manner of arraying contentions or stating propositions of law.

3. **Trial E f—Mistake in stating contentions of party should be brought to judge's attention in time for him to correct same.**

   Where the trial judge incorrectly states the contentions of the parties it is the duty of the party claiming error therein to call it to his attention in order to afford him an opportunity for correction.

4. **Trial E h—Trial court may recall jury and give additional instructions in its discretion.**

   The mere fact that the trial judge recalled the jury of his own motion to give them additional instructions after the case had been given them, and in the absence of counsel, is no ground for exception where there is no contention that the supplemental instructions were erroneous in law.

CIVIL ACTION, before *Schenck, J.,* at May Term, 1930, of HENDERSON.

The plaintiff instituted an action against the defendants upon a promissory note claiming a balance of $5,724.20. The defendants admitted the execution of the note, but alleged in substance that the note was procured for the purpose of paying a check issued on 24 April, 1926, by the Fleetwood of Hendersonville Hotel Corporation, when, as a matter of fact, at the time the original note was executed, the check had been paid; that the plaintiff had procured said note "upon misrepresentation in relation thereto which induced the defendants to execute said note," and that said original note was executed "by reason of wrongful and incorrect representations of said officers and without any cause whatever." When the case was called for trial the defendants admitted that they were severally and jointly indebted to the plaintiff in the sum of $5,724.20 with interest from 23 August, 1927, "unless the issue of fraud was answered in their favor."

The following issues were submitted to the jury:

1. "Did the plaintiff, The Citizens National Bank, procure the note of the defendant, Florida-Carolina Estates, Incorporated, endorsed by the defendant, H. Walter Fuller, for $7,614.40, dated 7 May, 1926, and the notes in renewal thereof, by the false and fraudulent representation that a check of the Fleetwood of Hendersonville Hotel Corporation, for $7,614.40 (including protest fees), was not paid on said date, namely, 7 May, 1926?"

2. "Is the plaintiff, Citizens National Bank, entitled to recover of the defendant, Florida-Carolina Estates, Incorporated, and H. Walter Fuller, the sum of $5,724.20 with interest from 23 September, 1927, as alleged in the complaint?"

3. "Are the defendants, Florida-Carolina Estates, Incorporated, and H. Walter Fuller, entitled to recover of the plaintiff, Citizens National Bank, the sum of $6,375.48, with interest from 7 May, 1926, less $5,724.20, with interest from 23 September, 1927, to wit, $1,287.52, as alleged in the answer and further defense?"

The jury answered the first issue "No," and the second issue "Yes." From judgment upon the verdict the defendants appealed.

Ewbank, Whitmire & Weeks for plaintiff.
Shipman & Arledge and J. W. Pless for defendants.

PER CURIAM. Exceptions 1, 2, 3, 4 and 5 are taken to certain questions and answers with respect to indebtedness due by the Laurel Park Estates to the Fleetwood of Hendersonville Hotel Corporation. These exceptions cannot be sustained. While technically the questions might not have been competent, it appears upon the record on page twenty-three the defendant Fuller was asked substantially the same questions without objection, in which he stated that the Fleetwood of Hendersonville Corporation claimed that the Laurel Park Estates was indebted to it. Furthermore it appears that the Fleetwood Corporation and Laurel Park Estates were for all practical purposes interlocking corporations.

Other exceptions are addressed to the charge of the court on the issue of fraud. Such exceptions are based upon the theory that the trial judge unduly emphasized the issue of fraud, but the record discloses that there was no exception to submitting an issue of fraud and that the defendants admitted liability unless "the issue of fraud is answered in their favor." Thus, fraud constituted the defense relied upon to defeat recovery, and there is nothing in the record to indicate that the trial judge abused his discretion in the manner of arraying contentions or stating propositions of law.

Exception was also taken to the statement of a contention by the trial judge with respect to two checks which were marked Exhibits H and I. If the trial judge stated the contentions incorrectly, it was the duty of the defendant to call his attention to the matter in order that he might have an opportunity to make necessary corrections.

Exception was also taken to the fact that the trial judge of his own motion recalled the jury and gave additional instructions during the absence of counsel. It is not contended that the supplemental instructions were incorrect. Hence, it cannot be said, as a matter of law, that it is error for a judge to recall a jury in his discretion and to give such additional instructions as he may deem wise and proper.

A careful examination of the record and briefs fails to convince the Court that error was committed in the trial.

No error.

ALEXANDER T. ANDREWS, BY HIS NEXT FRIEND LILLIE A. ANDREWS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 March, 1931.)

1. **Railroads D c—Allegation that supports of bridge were placed too near track is insufficient to establish breach of duty to trespasser.**

   Allegations of the complaint in an action against a railroad company to recover for a personal injury alleged to have been negligently inflicted, that the defendant permitted children to ride on its freight trains by holding to the side ladders of the cars at a place in the city used by them as a playground, and that the injury resulted from the plaintiff being struck while so riding by a support to a bridge placed too near to the tracks for safety, are held insufficient to establish a breach of duty by the defendant, and its demurrer was properly sustained.

2. **Pleadings D e—Demurrer admits relevant facts alleged and relevant inferences therefrom, but not conclusions or inferences of law.**

   A demurrer admits the relevant facts set out in the complaint and such relevant inferences of fact as may be deducible therefrom, but it does not admit conclusions or inferences of law, and references to the place where plaintiff's injury occurred as a "death trap" and to the negligence of defendant as "wilful and wanton" will be disregarded as inferences of law.

APPEAL by plaintiff from *Midyette, J.*, at November Term, 1930, of WAKE. Affirmed.

This is an action to recover damages for personal injury, in which a demurrer to the complaint was sustained.

At the time of his injury the plaintiff was a minor, fifteen years of age. The defendant maintains a roadbed and tracks extending through the city of Raleigh. At the Morgan Street intersection there is a bridge over the tracks. It is alleged in the complaint that the center supports under this bridge are not safely and properly placed in relation to the tracks, but are dangerously close to them and do not allow a safe clearance of the defendant's trains; that during a long period of time people have been riding on the defendant's trains when passing under the bridge, by holding on to the ladders on the sides of the cars; that on 24 March, 1930, about 12:30 p.m., the plaintiff and several other boys were playing at their usual playground located on or near the defendant's tracks, a short distance north of Hillsboro Street, the playground and track being within a few feet of the plaintiff's home; that the plaintiff boarded one of the defendant's freight trains, moving slowly in a southerly direction and clung to the ladder on the side of one of the defendant's box cars and passed safely under Hillsboro Street and expected to pass safely under Morgan Street, but as he reached Morgan Street the plaintiff was knocked from said car by one of the center posts or supports under said bridge and thereby injured. The several alleged grounds of negligence are then set forth.

The defendant demurred because (a) it appears from the complaint that the defendant breached no duty it owed the plaintiff, and (b) because it appears that the plaintiff by his own negligence contributed to his injury.

T. D. Parrish, R. L. McMillan and C. A. Douglass for plaintiff.
Murray Allen for defendant.

PER CURIAM. The demurrer filed by the defendant admits the relevant facts set out in the complaint and such relevant inferences of fact as may be deducible therefrom, but it does not admit conclusions or inferences of law. *Yarborough v. Park Commission,* 196 N. C., 284; *Ballinger v. Thomas,* 195 N. C., 517.

We are of opinion that the complaint, examined in the light of this rule, does not set forth the breach of any duty the defendant owed the plaintiff. *Bailey v. R. R.,* 149 N. C., 169; *Monroe v. R. R.,* 151 N. C., 374; *Brigman v. Construction Co.,* 192 N. C., 791. Reference to the place of the accident as a "death trap" and to the alleged negligence of the defendant as "wilful and wanton" may be disregarded as inferences of law, because the facts relied on are clearly and fully stated. Judgment

Affirmed.

J. R. COLE AND W. S. FORBES, PARTNERS, TRADING AS GLENN COMMISSION COMPANY, v. THE INDUSTRIAL FIBRE COMPANY, INC., AND INDUSTRIAL RAYON CORPORATION.

(Filed 25 March, 1931.)

1. **Contracts B a—Contract will ordinarily be given that interpretation given to it by parties prior to differences between them.**

   The parties to a contract will be presumed to know its intent and meaning better than strangers thereto, and where they have practically interpreted the contract while living under it in its peaceful performance the courts will ordinarily give it that construction which they themselves have given it before differences arose thereunder.

2. **Same—In construing a contract words will be construed with reference to subject-matter and objective of parties.**

   In construing a contract words employed therein will be construed with reference to the subject-matter of the contract, the context, and the object sought to be accomplished by the parties, and this rule is in consonance with the rule forbidding parol evidence varying, adding to, or contradicting the terms of a written instrument.

3. Brokers D a—In this case held: contract was for commission on completed sales where delivery was made and not upon acceptance of orders.

Where a contract provides for the payment by a manufacturing corporation of commissions to a selling agent upon "net sales" in a given territory, the manufacturer reserving the right of cancellation of orders obtained by the selling agent, and the parties, while peacefully living thereunder in its performance, have practically interpreted the words "net sales" to mean sales completed by delivery of goods: *Held*, the selling agent is entitled to commissions only on orders completed by actual delivery, and a subsequent supplemental agreement relating to "acceptance of orders" will be construed with reference to its object of relating orders to capacity output, and not to the payment of commissions, and it does not vary the original terms in regard to commissions, the original terms in this regard being expressly preserved in the supplemental agreement, and the submission of the contract to the jury in this case is held for error.

APPEALS by plaintiffs and defendants from *Sink, Special Judge,* at February Special Term, 1930, of MECKLENBURG.

Civil action to recover (1) commissions alleged to be due under exclusive representative's sales agreement, and (2) damages for the breach of said agreement.

The first disputed cause of action is for commissions on orders accepted and booked, but later canceled or upon which deliveries were never made.

By the terms of the contract between the parties, dated 30 June, 1926, the plaintiffs were "appointed exclusive representatives" for the sale of products of the Industrial Fibre Company (and its successor, Industrial Rayon Corporation), manufacturers of rayon yarns, in six Southern States: Virginia, North Carolina, South Carolina, Georgia, Alabama and Tennessee, for a period of eighteen months with the privilege of renewal from year to year. The right to refuse any or all orders was expressly reserved in the contract, with the proviso that in case orders exceeded capacity of output, proportionate shipments would be allotted to said territory, and equal coöperation given at all times, "in sales and deliveries," in the same manner and under the same terms as proportional allotments are made to other territories and other agents.

"In consideration of the above and as compensation for their services, the Industrial Fibre Company will pay to the Glenn Commission Company a commission on all net sales accepted by the Industrial Fibre Company, Inc., which come within the territory mentioned, at the rate of 1½%."

This agreement was modified by supplement 23 February, 1927, which cut down the territory of the plaintiffs to the States of Virginia, North Carolina and Tennessee.

In consideration of this reduction of territory, the Industrial Fibre Company agreed to change the rate of commission of one and one-half per cent (1½%) "on such sales," allowed the plaintiffs under the original contract, to "a new rate of commission, as follows: On orders which we accept priced under $1.00 per pound 0½%. On orders which we accept priced from $1.00 to $1.14 per pound 1%. On orders which we accept at $1.15 per pound or more 2%. It is understood between the parties that all other terms in the original contract dated 30 June, 1926, by and between the parties, excepting those above mentioned, shall remain the same in full force and effect until the termination of said agreement."

The contract was terminated on 22 August, 1927. Its unexpired term, therefore, was a little more than four months. The second cause of action is to recover damages for its alleged breach.

In the first cause of action, plaintiffs sue for commissions on orders sent in and accepted by the defendants during the amicable period of the agreement, but which were canceled before they were or could be filled; also for commissions on certain shipments made to the Hillcrest Silk Mills, with plants in New Jersey and North Carolina, because said shipments were made into plaintiffs' territory, though they had nothing to do with securing orders for said shipments, which came through a New York agency.

Plaintiffs concede that commissions under the contract "on all net sales" were paid monthly—accompanied by itemized statements—and that they never made any claim for commissions on cancellations prior to bringing the present suit. There is no contest over commissions for sales completed and deliveries actually made.

The trial court held that the original agreement was ambiguous and submitted to the jury the question whether the parties intended thereby to contract for commissions on cancellations; and held further, as a matter of law, that commissions on cancellations were recoverable under the supplemental agreement, from and after its execution, 23 February, 1927.

The jury returned the following verdict:

"1. What commissions, if any, is the plaintiff entitled to recover upon orders which the defendants accepted and booked prior to 22 August, 1927, but upon which deliveries were not made or completed? Answer: $2,800.

"2. What commissions, if any, is the plaintiff entitled to recover upon sales made to the Hillcrest Silk Mills prior to 22 August, 1927? Answer: $5,606.04.

"3. Did the defendant Industrial Fibre Company breach its contract with the plaintiff as alleged in the complaint? Answer: Yes.

"4. If so, what damages, if any, is the plaintiff entitled to recover of the defendant by reason of such breach? Answer: $14,000."

On the coming in of the verdict, the plaintiffs tendered judgment, including therein interest on the amounts awarded. No interest was allowed on the sums awarded by the jury prior to the rendition of the judgment, from which ruling the plaintiffs appeal.

Judgment on the verdict for plaintiffs, from which the defendants appeal, assigning numerous errors.

Cansler & Cansler and John M. Robinson for plaintiffs.

MacLean & Rodman, Beckerman & Felsman and P. C. Whitlock for defendants.

STACY, C. J., after stating the case: It was error to submit the original contract to the jury to ascertain the intention of the parties, and to hold that the supplemental agreement, from and after its execution, 23 February, 1927, covered commissions on cancellations. *Mining Co. v. Smelting Co.,* 122 N. C., 542, 29 S. E., 940. The parties themselves, during the peaceful life of the contract, construed it otherwise and so applied it in the practical operation of their business.

The general rule is, that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are least liable to be mistaken as to its purpose and intent. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593; *Wearn v. R. R.,* 191 N. C., 575, 132 S. E., 576; *Lewis v. Nunn,* 180 N. C., 159, 104 S. E., 470; *Guy v. Bullard,* 178 N. C., 228, 100 S. E., 328; *Plumbing Co. v. Hall,* 136 N. C., 530, 48 S. E., 810; 2 Williston on Contracts, sec. 623; 13 C. J., 546. "Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions." 6 R. C. L., 853.

It is often said that "the construction of a contract, when in writing or agreed upon, is a matter of law for the courts." *Barkley v. Realty Co.,* 170 N. C., 481, 87 S. E., 219. This is true, and in "those written contracts which are sufficiently ambiguous or complex to require construction, the general rule is that the intention of the parties is the polar star. . . . If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have." *King v. Davis,* 190 N. C., 737, 130 S. E., 707. Frequently, this intention can best be gathered from the practical construction of the contract which the parties themselves have adopted and observed during the period of harmonious operation. *Mitchell v. Heckstall,* 194 N. C., 269, 139 S. E., 438.

Speaking to the subject in *Manhattan Life Ins. Co. v. Wright,* 126 Fed., 82, *Sanborn, Circuit Judge,* delivering the opinion of the Court, says: "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such construction are not likely to commit serious error," citing a number of authorities for the position.

To like effect is the holding in *Hull Co. v. Westerfield,* 107 Neb., 705, 186 N. W., 992, 29 A. L. R., 105 (as expressed in the fourth headnote): "The interpretation or construction given contracts by the parties to them, while engaged in their performance before any controversy has arisen, is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction." See, also, *Hammett Oil Co. v. Gypsy Oil Co.,* 95 Okla., 235, 218 Pac., 501, 34 A. L. R., 275.

The reason for following the practical interpretation of the parties is stated by *Mr. Justice Nelson* in *Chicago v. Sheldon,* 9 Wall., 50, as follows: "In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." Quoted with approval in *Topliff v. Topliff,* 122 U. S., 121.

Finally, we may safely say that in the construction of contracts, which presents some of the most difficult problems known to the law, no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements. Anson on Contract, p. 436.

Nor is the practical construction placed upon the contract by the parties in the instant case at variance with the terms of the instrument itself. It is provided in the original agreement that commissions will be paid "on all net sales accepted by the Industrial Fibre Company," which provision is expressly brought forward and made a part of the supplemental agreement. The dual purpose of this supplemental agreement was to reduce the plaintiffs' territory and to substitute "a new rate of commission," but the basis of the rate, *i. e.,* "on all net sales," was left unchanged. The parties understood, and so interpreted their agreement to mean, that commissions would be paid on all "net sales," that is, sales completed by deliveries and made on orders accepted by the defendants for the territory mentioned in the contract. The term "net sales," then, as intended by the parties, according to their own construction of the contract, was used in the sense of sales completed by deliveries out of orders accepted by the defendants for the territory in question. This interpretation not only accords with the understanding of the parties, but it also fits in with the ordinary meaning of the language employed, when viewed in the light of what the parties were undertaking to accomplish by their agreement.

The terms "accepted by the Industrial Fibre Company," used in the original agreement, and "orders which we accept," employed in the supplemental agreement, were intended to protect the defendants from excessive orders, and to authorize a proportional allotment of "sales and deliveries" to the different territories and different agents according to the ability of the defendants, with their limited capacity output, to fill said orders. This is the meaning which the parties themselves placed upon the terms of the contract.

The law is, that "an agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement," and that "greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent." Anson on Contract, p. 425; Wigmore on Evidence, sec. 2460; *Porter v. Construction Co.,* 195 N. C., 328, 142 S. E., 27. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," says *Mr. Justice Holmes* in *Towne v. Eisner,* 245 U. S., 418. General or particular meaning-content, therefore, may be imputed to words and phrases according to the circumstances of their use and the objects sought to be accomplished by the parties. This is not at variance with the rule that the written word abides, and that the terms of a contract put in writing may not be varied or contradicted by parol, but is entirely consonant therewith. The one belongs to the field of evidence, the other to the construction of contracts. *Spragins v. White,* 108 N. C., 449, 13 S. E., 171.

The court's erroneous construction of the contract necessarily affected the measure of damages for its breach, hence a new trial must be awarded on the second cause of action as well as on the first.

This disposition of the defendants' appeal renders the question of interest, presented by plaintiffs' appeal, and the liability of the defendants for commissions on sales made to Hillcrest Silk Mills, unnecessary to be decided on the present record.

New trial.

VIRGINIA-CAROLINA CHEMICAL CORPORATION v. MARGARET STUART AND J. H. STUART.

(Filed 25 March, 1931.)

Homestead A d—Where homestead is laid off in equity of redemption the mortgage debt should not be considered in ascertaining its value.

A homestead exemption may be laid off in an equity of redemption, but when so done it is subject to the lien of the mortgage registered prior to the docketing of the judgment under which the execution is issued, and the mortgage debt should not be taken into consideration in appraising the value of the land for the homestead right.

APPEAL by plaintiff from *Moore, Special Judge,* at Second February Term, 1931, of WAKE. Reversed.

By consent of the parties, a jury trial was waived and the court below found the facts and rendered judgment:

"1. That on 21 October, 1929, judgment was rendered in the above-entitled cause in favor of the plaintiff and against the defendants in the sum of $500, with interest thereon from said date until paid, at the rate of six per cent per annum; that said judgment is docketed in Judgment Docket No. 33, at page 233, of the office of the clerk of the Superior Court.

2. That at the time of rendition and the docketing of said judgment the defendant, Margaret Stuart, was the owner and was possessed of a life estate in 71.37 acres of land, located and being in Middle Creek Township, Wake County, North Carolina; that the defendant, J. H. Stuart, was the owner and possessed of a life estate in 66.69 acres of land located in said county and state.

3. That on 5 April, 1927, the defendant, Margaret Stuart, joined in a deed of trust along with the remainderman, embracing the said 71.37 acres of land, wherein and whereby the North Carolina Joint Stock Land Bank was beneficiary, securing the said bank for a loan in the sum of $2,000 on the amortization plan, which deed of trust was filed

and duly recorded prior to the time of the rendition and docketing of plaintiff's judgment above set forth.

4. That on 9 April, 1927, the defendant, J. H. Stuart, joined in a deed of trust along with the remainderman, embracing the said 66.69 acres of land, wherein and whereby the North Carolina Joint Stock Land Bank was beneficiary, securing the bank for a loan in the sum of $1,500 on the amortization plan, which deed of trust was filed and duly recorded prior to the time of rendition and docketing of the plaintiff's judgment above set forth.

5. That on 6 November, 1930, at the instance of the plaintiff, the clerk of the Superior Court of Wake County, issued an execution in the above-entitled cause directed to the sheriff of Wake County, North Carolina, and that under and by virtue of the said execution the said sheriff summoned three discreet persons qualified to act as jurors, as appraisers, and after being sworn by him, there being no personal property found belonging to the defendant, Margaret Stuart, proceeded to allot and assign to her a homestead in the said 71.37 acres of land, which homestead included the main dwelling, tobacco pack barn, garage, smoke-house, and cow shed, including four acres of land upon which the same was situate. That the said appraisers did not take into consideration in allotting and assigning to said defendant her homestead the outstanding mortgage mentioned above on said premises, but assessed the value of said buildings and land included therein at the sum of $1,000, burdened with the said mortgage. That it is agreed by plaintiff and defendants that the said homestead allotted and assigned to defendant, Margaret Stuart, affected by and burdened with said mortgage is worth the sum of $1,000. That the said homestead was allotted and assigned, as aforesaid, on 11 November, 1930.

6. That pursuant to said execution and under and by virtue of the authority contained therein, the sheriff of Wake County did on 12 October, 1930, summons three discreet persons qualified to act as jurors, as appraisers, and after being duly sworn by him, proceeded to lay off and assign to the defendant, J. H. Stuart, his personal property exemption, and there being no excess, they allotted and assigned to the said J. H. Stuart a homestead in the 66.69 acres of land mentioned above, which homestead included 6.2 acres of land, embracing his dwelling-house and other outhouses which they valued at $1,000, the same being affected by and burdened with the mortgage mentioned above. That they did not take into consideration the said mortgage debt in the allotment of the said homestead. The court finds that the said homestead as allotted is not worth $1,000, whether affected by or burdened with said mortgage debt.

7. That the commissioners, in making the allotment of the homestead of the defendant, Margaret Stuart, and the defendant, J. H. Stuart,

did not take into consideration the encumbrances on said lands, nor the fact that each of said defendants were life tenants only in arriving at the value of the said two homesteads, but they allotted the said homesteads as though the said lands were unencumbered and said defendants were seized in fee thereof; that each of the defendants in apt time filed exceptions to the returns.

Upon the foregoing findings of facts the court is of the opinion, and so holds as a matter of law:

First. That the homestead of the defendant, Margaret Stuart, should be allotted and assigned to her in said 71.37 acres of land, in which she has a life estate, in the sum of $1,000, over and above the encumbrance, to wit, $2,000, to the North Carolina Joint Stock Land Bank.

Second. That the homestead of the defendant, J. H. Stuart, should be allotted and assigned to him in the 66.69 acres of land, in which he has a life estate in the value of $1,000, over and above the mortgage encumbrance, to wit, $1,500, to the North Carolina Joint Stock Land Bank.

It is thereupon ordered, decreed and adjudged that the returns of the sheriff of Wake County filed in this matter and the appraisers or jurors selected and summoned by him to lay off and assign the homestead of the defendant, Margaret Stuart and J. H. Stuart, be and the same is hereby set aside, and it is further ordered, decreed and adjudged that A. L. Jackson, E. L. Keith and Mayton Smith be, and they are, hereby appointed commissioners, the same being found by the court to be discreet persons qualified to act as jurors, who shall after being duly summoned and sworn by the sheriff of Wake County meet upon the premises of the defendant, Margaret Stuart, and allot and assign to her a homestead in the 71.37 acres of land in which she has a life estate, at the value of $1,000, over and above the $2,000 outstanding mortgage in favor of the North Carolina Joint Stock Land Bank, the homestead to include the dwelling of said defendant. And it is further ordered that the said commissioners will allot and assign to the defendant, J. H. Stuart, a homestead in said 66.69 acres of land in which he has a life estate, at the value of $1,000, over and above the $1,500 outstanding mortgage in favor of the North Carolina Joint Stock Land Bank, the said homestead to include the dwelling of the said defendant, and of their proceedings report to the next term of this court."

Dupree & Strickland for plaintiff.
R. B. Lewis for defendants.

CLARKSON, J. The only question involved on this appeal: In enforcing a judgment lien should prior recorded mortgages and other encumbrances be taken into consideration in arriving at the value of a homestead, or should the homestead be allotted subject to and burdened with prior encumbrances as though they did not exist? We think the homestead should be allotted subject to and burdened with prior encumbrances as though they did not exist. This has been long the practice and procedure in this jurisdiction.

In *Cheatham v. Jones,* 68 N. C., 153, the headnote is as follows: "A debtor is entitled to a homestead in an equity of redemption, subject to the mortgage debts."

Pearson, C. J., at p. 155, speaking to the subject: "The question presented by the case is this: Has a mortgagor in possession a right to a homestead, as against all other creditors, save the creditors secured by the mortgage? We concur in the opinion of his Honor, that the homestead is exempt from sale under execution, and that the mortgagor, although he holds subject to the mortgage debt, holds his homestead paramount to the other creditors. A mortgage is a mere encumbrance upon a man's land, given as a security for the debts therein set out; and if he can discharge the encumbrance by the sale of the lands outside of his homestead, or in any other way, creditors who are not secured by the mortgage, have no ground upon which to deprive him of the homestead secured by the Constitution. We are of opinion that a debtor is entitled to a homestead in an 'equity of redemption,' subject to the mortgage debts, just as a purchaser in possession is entitled to a homestead, subject to the payment of the purchase money." *Cheek v. Walden,* 195 N. C., 752; *Farris v. Hendricks,* 196 N. C., 439.

In McIntosh N. C. Practice and Procedure, part sec. 764, at p. 885, we find: "The debtor may also have a homestead in an equitable interest in land. When the land is subject to mortgage, the legal title is in the mortgagee, as between him and the mortgagor, but as to others the mortgagor is considered the owner, and he may have a homestead in the equity of redemption. (Citing the *Cheatham case, supra).* It is taken, however, subject to the mortgage lien, and it is obtained by allotting from all the land a part to the value of $1,000, and requiring the part outside of the homestead to be applied first to the lien before resorting to the homestead, instead of attempting to lay off enough land to make the equity of redemption worth $1,000," citing *Burton v. Spiers,* 87 N. C., 87.

Under the above authorities we think the judgment of the court below should be

Reversed.

ATLANTIC COAST LINE RAILROAD COMPANY v. LENOIR COUNTY ET AL.

(Filed 25 March, 1931.)

1. **Counties B b—County commissioners may correct error in minutes as to rate of taxation for general county purposes.**

   An erroneous entry in the minutes of the board of county commissioners as to the amount assessed on the one hundred dollars valuation of property is subject to correction by the board so as to make the record speak the truth and show it was not in violation of constitutional limitations.

2. **Same—Evidence of error in recording minutes and subsequent correction held sufficient, proceedings of board being proper evidence thereof.**

   The entries of record of the board of county commissioners relating to a correction of an erroneous entry to make it speak the truth, showing its proceedings of several sessions in that respect, is the best evidence thereof, and where matters are submitted to the judge to find the facts, and the proceedings are sufficient, his finding upholding the validity of the correction is conclusive.

3. **Taxation A b—Legislative authority to levy special taxes may be given by special or general act.**

   The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act, Article V, section 6, and *held:* authority is conferred by C. S., 1297-8½, upon county commissioners to levy a tax for the special purpose of maintaining a home for aged and infirm and other similar institutions, and by C. S., 7075, for the special purpose of preserving the public health, but no authority is given to levy a special tax for the purpose of raising revenue for the maintenance of the county court and public welfare departments.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at November Term, 1930, of LENOIR.

This is an action to recover of the defendants the sum of $480.48, with interest from 9 January, 1929, as taxes illegally assessed against the plaintiff (a taxpayer of Lenoir County) and paid under protest. P. L. 1927, ch. 80, sec. 464, N. C. Code, 1927, sec. 7880 (189).

On 6 August, 1928, the board of commissioners of Lenoir County levied a tax of fifteen cents on property valued at $100 as general county taxes for ordinary county purposes, seven cents for the county home, county aid, health and poor relief, and one cent for the county court and public welfare.

The minutes of the board were recorded as showing a levy of twenty-three cents for general county purposes and for health, county court, public welfare and other general items.

On the first Monday in September, 1929, the board of commissioners amended and corrected the error in the minutes "so as to speak the truth and show the levy actually made when the board met on 6 August, 1928." The county auditor filed a summary of the budget on 6 August, 1929, showing the amounts necessary to be raised from the taxes of 1928 to cover the items therein named, the assessed valuation of all property in the county for 1928 being $27,761,000.

A levy of five cents was necessary for the support of the county home, the farm, county aid, and relief of the poor. The board attempted to levy a special tax of one cent for the county court and the public welfare department.

The foregoing facts were found by the court, trial by jury having been waived, and were set out in the judgment.

Upon these facts it was adjudged that the special levy of five cents made by the county of Lenoir for the year 1928 was duly, properly and lawfully made for the special purpose of raising sufficient funds to take care of the county home and farm, county aid and poor relief; that it was made with the special approval of the General Assembly; that the county of Lenoir had the full right and power to collect taxes from the plaintiff in accordance therewith, and that the plaintiff herein is not entitled to recover of the defendant the tax paid by it on account thereof, and sued on in this action; also that the special levy of two cents was duly, properly and lawfully made for the special purpose of raising sufficient funds for the preservation of the public health of Lenoir County; that it was made with the special approval of the General Assembly; that the county of Lenoir had the full right and power to collect taxes from the plaintiff; and that the plaintiff is not entitled to recover of the defendant the tax paid by it on account thereof and sued on in this action; also that the attempted levy of one cent to raise sufficient funds to conduct the county court and public welfare departments was made without any special approval of the General Assembly; that the said county of Lenoir had no right to levy the same, and that the plaintiff is therefore entitled to be reimbursed by said county out of the taxes paid by it the sum of $60.06, being the amount paid by the plaintiff on account of said one cent levy, together with interest thereon from 9 January, 1929, until paid.

The plaintiff excepted and appealed.

Rouse & Rouse for plaintiff.
Wallace & White for defendants.

ADAMS, J. The minutes entered of record at a meeting of the board of commissioners on 6 August, 1928, recited the levy of a tax of twenty-three cents on property valued at one hundred dollars. The plaintiff contends that this levy is in conflict with the constitutional provision that the total of the State and county tax on property shall not exceed fifteen cents except when the county property tax is levied for a special purpose and with the special approval of the General Assembly. Constitution, Art. V, sec. 6. The defendants say that a county tax of only fifteen cents was levied, the remainder of the twenty-three cents being for special purposes and with special legislative approval, and that the entry on the minutes of the board was an error of the draftsman which was corrected at a subsequent meeting of the board.

We have held that while a board of county commissioners cannot with retroactive effect change a tax which it has purposely imposed in the way the law prescribes, it may correct an erroneous entry upon the minutes so that the record shall, in the language of the law, "speak the truth" concerning the tax. *R. R. v. Reid,* 187 N. C., 320; *R. R. v. Forbes,* 188 N. C., 151; *R. R. v. Cherokee County,* 195 N. C., 756. We are not aware of any satisfactory reason why the principle should not apply in the present case. The board did not undertake to levy another tax, but in effect to explain the marginal entry of "15 cents general, 8 cents special."

Whether the minutes of 6 August, 1928, had been erroneously recorded and whether they had been subsequently corrected were matters for the court to determine, a trial by jury having been waived. It is admitted by the appellant that the court's finding of facts, under such circumstances, is ordinarily as conclusive as the verdict of a jury; but it is insisted that the finding is not supported by the evidence. In our opinion the evidence is sufficient to sustain the facts as found by the presiding judge. The proceedings of the several sessions, which are a part of the pleadings, may be regarded not only as proper evidence, but as the best evidence of the matters to which they relate.

The plaintiff contends that the levy of five cents for the support of the county home and for "county aid and poor relief," and of two cents for the preservation of the public health in the county was not imposed for a special purpose and with the special approval of the General Assembly.

It will be observed that the special approval of the Legislature may be expressed by a special or a general act. Constitution, Art. V, sec. 6. At the session of 1923 a statute was enacted which authorizes the boards of commissioners of the various counties to levy a tax not to exceed five cents for the purpose of maintaining county homes for the aged and infirm and other similar institutions. C. S., 1297-8½. This is a special purpose within the contemplation of the constitutional provision, and we construe the words "county aid and poor relief" to be within the scope of the special purpose which is indicated in the statute.

The tax of two cents purports to have been levied under section 7075 of the Consolidated Statutes, which authorizes the board of county commissioners of each county to levy a special tax, to be expended under the direction of a committee, for the preservation of the public health.

This, in the language of the statute, is a special tax. It is to be levied for a special purpose with the special approval of the General Assembly. The appellant cites *Armstrong v. Board of Commissioners,* 185 N. C., 405, in support of its position; but that case dealt primarily with Article II, section 29, of the Constitution, and recognized the validity of C. S., 7075, and the conferred authority to levy the tax therein provided for the protection and conservation of the public health. Judgment

Affirmed.

J. L. MOREHEAD v. R. W. MONTAGUE, ADMINISTRATOR, ET AL.

(Filed 25 March, 1931.)

1. **Deeds and Conveyances C c—Deed to A. during her lifetime and at her death to the heirs of her body begotten by T. conveys fee to A.**

   A deed to lands by a husband to his wife during her lifetime and at her death to the heirs of her body begotten by him, and in the event no heirs are born to them the land to revert to the grantor: *Held,* upon the birth of a child to them the limitation over is defeated, and the estate vests in the wife in fee tail special, which is converted into a fee simple by C. S., 1734.

2. **Same—Rule in Shelley's case applies where lands are conveyed to A. and the heirs of her body begotten by her husband T.**

   Were a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in *Shelley's case,* converted into a fee simple absolute by our statute. C. S., 1734.

APPEAL by plaintiff from *Moore, Special Judge,* at February Term, 1931, of WAKE. Affirmed.

The plaintiff brought suit to recover of the defendant Montague, as administrator of E. R. Gulley, deceased, the sum of $1,500 for the alleged wrongful cutting and removal of timber from land claimed by the plaintiff. The parties agreed upon the facts which are substantially as follows: J. K. Todd was the owner in fee of a tract of land in Johnston County. On 17 December, 1897, he executed a deed purporting to convey the land to Della Todd, his wife, "during her lifetime, and at her death to the heirs of her body begotten by J. K. Todd." The deed contained these additional provisions: "In the event no heirs are born to them, then the land is to revert to J. K. Todd, his heirs, at the death of Della Todd." The habendum follows: "To have and to hold, the aforesaid tract or parcel of land and all the privileges and appurtenances thereto belonging to the said Della Todd during her natural lifetime at her death to the heirs of her body begotten by J. K. Todd in the event that no heirs are born to them then the land is to revert to J. K. Todd and his heirs at the death of Della Todd to their only use and behoof forever."

J. K. Todd and Della Todd had a son, Jack Marlan Todd, who was born 20 October, 1898. In 1914 the husband and wife were divorced *a vinculo.*

On 25 November, 1903, J. K. Todd and his wife executed a deed purporting to convey the land in fee simple to E. R. Gulley. The deed was recorded and Gulley held possession of the property from the date of his deed to 22 April, 1929. On 26 August, 1922, Jack Marlan Todd executed a deed, which was duly recorded, purporting to convey the land in fee to J. L. Morehead, the plaintiff. E. R. Gulley and his wife executed to trustees a deed of trust dated 13 February, 1928, which was duly registered, to secure the payment of a note in the sum of $4,000, due the Bank of Wendell. On 22 April, 1929, E. R. Gulley and his wife transferred the land in controversy and other property to trustees by a deed which also is registered. E. R. Gulley died 15 May, 1929, and the defendant Montague is his administrator.

During the lifetime of the said E. R. Gulley he contracted to sell and did sell to Guy C. Lee, a number of logs and standing timber trees on the aforesaid lands, at an agreed price of $6.00 per thousand feet for the logs and $5.00 per thousand feet for the standing timber trees, and thereafter, before the purchase price for said logs and timber trees had been paid, E. R. Gulley died, and thereupon, commissioners were appointed in the case of *Bank of Wendell v. E. R. Gulley,* with which case this action was later consolidated, and the commissioners collected from Guy C. Lee the full amount of the value of all logs and timber trees which had been cut and removed from said lands, which amount the commissioners paid to J. W. Bunn, attorney for the Bank of Wendell, pursuant to directions in a former judgment of the court in said action.

The plaintiff brought suit to recover the value of the timber.

It was adjudged upon the facts agreed that J. K. Todd and his wife conveyed to E. R. Gulley a title in fee and that the plaintiff is not entitled to the relief prayed. The plaintiff excepted and appealed.

J. L. Morehead and W. H. Murdock for plaintiff.

Bunn & Arendell, James D. Parker, Winfield H. Lyon and Phillip Whitley for defendants.

ADAMS, J. Our disposition of the present appeal is dependent upon the interpretation of the deed executed by J. K. Todd on 17 December, 1897. If his deed conveyed to Della Todd, his wife, a title in fee, the deed which he and his wife executed and delivered to E. R. Gulley on 25 November, 1903, likewise conveyed the fee, and not merely an estate for her life.

A conveyance of land "to Della Todd during her lifetime and at her death to the heirs of her body," without additional words, would transfer the fee. *Foley v. Ivey,* 193 N. C., 453; *Tyson v. Sinclair,* 138 N. C., 23; *Leathers v. Gray,* 101 N. C., 162. What is the effect of the qualifying words, "begotten by J. K. Todd"?

In *Thompson v. Crump,* 138 N. C., 32, this Court held that a devise of land "to my son James for and during his life, and after his death to his lawful heirs, born of his wife," was not within the rule in *Shelley's case,* the words "born of his wife" qualifying the explaining phrase "his lawful heirs," so as to confine the remainder to the children of his wife and to prevent the operation of the rule. The decision followed *Dawson v. Quinnerly,* 118 N. C., 188. But in *Sessoms v. Sessoms,* 144 N. C., 121, the Court disapproved the ruling in these cases and in *Bird v. Gilliam,* 121 N. C., 326, and held that the first devisee takes an estate in fee simple if the terms of the devise carry the entire estate in fee tail, whether general or special. So it has been held that a deed conveying land to a married woman and her heirs "by her present husband" vests an estate in fee. *Jones v. Ragsdale,* 141 N. C., 200; *Paul v. Paul,* 199 N. C., 522. Under the former law the estate would have been a fee tail special, but our statute provides that every person seized of an estate tail shall be deemed to be seized thereof in fee simple. C. S., 1734. The rule in question applies where there is a gift to a husband with remainder to the heirs of his body by his present wife, or to a wife with remainder to the heirs of her body by her present husband. In the first instance the heirs are to be ascertained upon the death of the husband; in the latter upon the death of the wife. I Tiffany on Real Property, 532, sec. 148. It will be noted that the limitation over was defeated and the estate became absolute upon the birth of the son, Jack Marlan Todd. *Radford v. Rose,* 178 N. C., 288. Judgment

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF ALLEN J. MAXWELL, COMMISSIONER OF REVENUE, v. CHEMICAL CONSTRUCTION COMPANY.

(Filed 25 March, 1931.)

Taxation A i—State may not tax United States patent nor income derived therefrom.

A State may not directly tax a patent right issued by the United States government, nor may it indirectly tax such patent right by taxing the income derived from royalties therefrom.

APPEAL by relator from *Moore, Special Judge,* at January Term, 1931, of WAKE. Affirmed.

This is a proceeding instituted by the relator, Commissioner of Revenue of the State of North Carolina, as authorized by statute (section 335, chapter 345, Public Laws of N. C., 1929), for the assessment of the income of the respondent, a corporation organized under the laws of this State, for the year 1929, for the purposes of taxation. Section 310, chapter 345, Public Laws of N. C., 1929.

The income of respondent for the year 1929 was assessed at the sum of $134,341.96. This income was derived from royalties received during said year by the respondent, as owner by assignment of certain patents issued by the Commissioner of Patents of the United States, under and pursuant to an act of Congress, enacted under the provisions of clause 8, section 8 of Article I of the Constitution of the United States, 35 U. S. C. A., 36. A tax authorized by statute (section 311, chapter 345, Public Laws of N. C., 1929), amounting to $6,907.76, was levied by the relator on said income.

Upon notice of the assessment of said income, and of the levy of said tax, respondent filed exceptions to the findings both of fact and of law, on which said assessment was made and on which said tax was levied. These exceptions were overruled. The respondent thereupon paid the tax levied, under protest, and appealed from the ruling of the relator on its exceptions to the Superior Court of Wake County, in accordance with the provisions of section 341, chapter 345, Public Laws of N. C., 1929.

The appeal was heard in the Superior Court on facts agreed, as appears by a stipulation filed in said court. On the facts agreed, the court was of opinion that the tax levied by the relator, and paid by the respondent, is illegal, for that the income of respondent derived from royalties on patents issued by the Commissioner of Patents of the United States, pursuant to the act of Congress, is not subject to taxation by the State of North Carolina.

From judgment in accordance with the opinion of the court, that the respondent recover of the State of North Carolina the amount paid as a tax on its income as assessed by the relator, together with the costs of this proceeding, the relator appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for the relator.

Brooks, Parker, Smith & Wharton for respondent.

CONNOR, J. The sole question presented by this appeal is whether a tax levied under the authority of a statute of North Carolina, on income derived from royalties received by a corporation organized under the laws of this State, for the use of patents issued by the Commissioner of Patents of the United States, and owned by the corporation, is valid.

This identical question was presented to the Supreme Judicial Court of Massachusetts for decision in *Rockwood v. Commissioner of Corporations and Taxation,* reported in 257 Mass., 572, 154 N. E., 182, 55 A. L. R., 928. In that case it was held that a State cannot tax royalties for the use of a patent issued by the Commissioner of Patents of the United States under the authority of an act of Congress. The Congress of the United States is expressly empowered "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Section 8, Article I, Const. of U. S. In the opinion in the cited case it is said: "A patent right itself is not taxable by a State. Letters patent issued by the United States give to the patentee a right of monopoly in the invention, and with this right the State cannot interfere." The patent is the instrumentality by which the United States confers upon the patentee, his heirs and assigns the right to the exclusive use of his invention or discovery, for a limited time. "As a State cannot tax the patent, it cannot tax the royalties received from its use. What the State cannot do directly, it cannot accomplish in an indirect way."

The judgment in the above-cited case was reviewed by the Supreme Court of the United States in *Long, Comr. of Corporations and Taxation v. Rockwood,* 277 U. S., 145, 72 L. Ed., 824. The judgment was affirmed. In the opinion of the Court, delivered by *Mr. Justice McReynolds,* it is said: "These causes present the question whether the State of Massachusetts may tax, as income, royalties received by one of her citizens for the use of patents issued to him by the United States? The Supreme Judicial Court of that State held such an imposition would amount to a tax upon the patent right itself, and was prohibited by the Federal Constitution. We agree with this conclusion."

Many authoritative decisions are cited in support of the decision in that case. We regard this decision as authoritative and conclusive upon us. It seems to have been so regarded by the Supreme Court of Tennessee in *Quick-Safe Mfg. Corp. v. Graham, Comptroller,* decided on 30 June, 1930, and reported in 29 S. W. (2d), 253.

We do not think that the decision in *Long v. Rockwood* is affected as an authority on the question presented in the instant case, as suggested by the Attorney-General in his brief filed in this Court as counsel for the relator, by the decision in *Educational Films Corporation v. Ward,* decided on 12 January, 1931, and reported in 75 L. Ed., at page 223. In that case a tax levied under a statute of the State of New York on complainant for the privilege of exercising its corporate franchise in said State, was upheld, although the amount of the tax was determined by the income of the complainant derived from royalties for the use of patents owned by complainant. The decision of the question there presented was not controlled by the decision in *Long v. Rockwood.* The distinction is made in the opinion of the Court delivered by *Mr. Justice Stone.* The judgment in the instant case is

Affirmed.

D. M. HILL AND JOHN F. BRUTON, TRUSTEE, v. THE STAR INSURANCE COMPANY OF AMERICA; MERCURY INSURANCE COMPANY OF ST. PAUL, MINN.; ÆTNA INSURANCE COMPANY OF HARTFORD, CONN.

(Filed 25 March, 1931.)

1. **Arbitration and Award E d—Where award is void for fraud parol evidence as to amount of damage is admissible.**

Where a policy of fire insurance contains an agreement to arbitrate the amount of loss thereunder in case of disagreement between the insurer and insured, each to select a disinterested person and the two thus selected to select a third to act in case they did not agree, and the evidence is sufficient to go to the jury on the question that the award was conditionally signed and there was evidence of fraud vitiating this feature of the policy, parol evidence as to the amount of the loss sustained by fire under the terms of the policy is competent to show the loss actually sustained by the insured, not in contradiction of the written instrument, for upon the establishment of the fraud the relevant portion of the policy is disregarded.

2. **Arbitration and Award E c—Evidence that award was conditional and fraudulent held sufficient to be submitted to jury.**

Where an arbitration stipulation in a policy of fire insurance requires that in case of loss the insurer and insured should each select a competent and disinterested person to act for them, and the persons thus selected should select a third to act in case they could not agree, and there is evidence that the insurer had selected one of its experienced adjusters who induced the arbitrator selected by the insured, inexperienced in such matters, to sign an award under the misrepresentation that the third arbitrator would have to pass upon the amount of the loss, and with this understanding the award was signed, and that the award was grossly inadequate: *Held*, sufficient to be submitted to the jury upon the issue of the actionable fraud of the insurer vitiating the award.

3. **Arbitration and Award C a—Arbitrators appointed by parties under agreement must be disinterested.**

Where a contract of fire insurance provides that in case of loss where the insurer and insured cannot agree upon the amount that they should appoint a disinterested person, and that the two thus selected should appoint a third, the general qualifications of the persons thus selected are that they should not be interested, biased, or prejudiced, and evidence that the person appointed by the insurer was frequently employed by the insurer who paid him a fee is not conclusive that such appointee is not qualified, but is evidence to go to the jury as to his qualification.

APPEAL by defendant from *Cranmer, J.*, and a jury, at November Term, 1930, of WILSON. No error.

These are actions brought by plaintiffs against the defendants to recover on certain insurance policies, in the aggregate of $6,500 on the home of plaintiff, D. M. Hill, which was practically destroyed by fire on 27 October, 1928. The plaintiff, John F. Bruton, was trustee to secure certain indebtedness on the property and the policies had attached the New York Standard mortgage clause in his favor as trustee. The loss and damage under said policy was payable to him as his interest may appear. The policy had attached what is known as a 75 per cent coinsurance clause. The actions were consolidated and plaintiffs' claim for damage, the minimum, amounted to $5,174.

Defendants in their answer set up that under the terms of the policy, that when no agreement could be arrived at between the parties, as to the amount of the loss, an appraisal should be had and the method fixed by the policy. The assured selected R. D. Gladding and the defendants selected W. B. Barrow, and the two selected as umpire one D. J. Rose. That Gladding and Barrow appraised the sound value at $4,500, and loss and damage at $2,445.79. That said amount was tendered to plaintiffs on 28 January, 1929, which plaintiffs declined to accept. That "said award in writing was signed by each of the appraisers selected by the assured and by the company and is binding under the terms of the said policy upon the said plaintiff and upon the defendants, and by reason thereof and of the matters and things herein set forth, the said plaintiffs are estopped to claim that the said loss and damage to the property insured, by the said fire occurring on or about 27 October, 1928, is in excess of $2,445.79."

The plaintiff in reply stated that the terms of the policy provided: "In case the insured and this company shall fail to agree as to the amount of loss or damage, it shall, on the written demand of either, select a *competent and disinterested appraiser.*" That W. B. Barrow was not a disinterested appraiser, but "the said W. B. Barrow, for a long time prior thereto, had been practically a regular appraiser of the Southern Adjustment Bureau, and in making appraisals, and in making this appraisal, the said W. B. Barrow acted as the representative of defendant companies, and not as a disinterested appraiser." This was unknown to plaintiff. "That the said W. B. Barrow, instead of considering himself an impartial appraiser, considered himself as the direct representative of the defendant companies in making said appraisal; that he entered into the said appraisal, not for the purpose of ascertaining the true loss and damage, but for the purpose of reducing the loss and damage to the very lowest possible figure, regardless of whether or not such lowest possible figure should represent the true and correct loss and damage or not. . . . That the said W. B. Barrow soon ascertained that R. D. Gladding was inexperienced, and took advantage of the inexperience of the said R. D. Gladding, in making said appraisal; that the said R. D. Gladding declined to sign the appraisal report until he was assured by the said W. B. Barrow that the final estimate of loss and damage would be passed upon by D. J. Rose, the umpire selected, and that it was only upon the assurance given him by W. B. Barrow that D. J. Rose would pass upon and make the final estimate of loss and damage, that the said R. D. Gladding signed the said appraisal agreement. . . . The said W. B. Barrow taking advantage of the inexperience of R. D. Gladding, assured him that the said D. J. Rose would make the final estimate of the loss and damage, and procured his signature to the said appraisal agreement by such assurance, although the said W. B. Barrow knew at the time of making such assurance, that under the strict letter of the appraisal agreement the same were false and untrue. . . . That the purported appraisal and award signed by the appraisers, R. D. Gladding and W. B. Barrow, constituted a fraud upon the rights of these plaintiffs, and for the further reason that the amount arrived at therein was so grossly and palpably inadequate and unjust and so out of proportion to the amount of actual damages as to be inequitable and unconscionable. The actual amount of the damage was a minimum of $5,174, whereas, the figure arrived at by the methods employed by the said W. B. Barrow amounted to only $2,445.79, a discrepancy of more than $2,700 between the actual and the awarded damages and an amount less than one-half of the actual amount of the damage. These plaintiffs aver that the purported appraisal arrives at such an outrageously and palpably inadequate conclusion as to be apparent that it is a fraud upon these plaintiffs."

The issues submitted to the jury and their answers thereto were as follows:

"1. Has there been an appraisal and award as to the amount of damages to which plaintiffs are entitled under the insurance policies sued on in this action? Answer: Yes.

2. Was the appraiser, W. B. Barrow, at the time of the alleged appraisal and award, disinterested? Answer: No.

3. Was the appraiser, R. D. Gladding, unduly and fraudulently influenced and controlled in the interest of the defendants by said W. B. Barrow? Answer: Yes.

4. Was the signature of the appraiser, R. D. Gladding, to the alleged appraisal obtained by the fraud and misrepresentation of said W. B. Barrow? Answer: Yes.

5. Was the appraiser, W. B. Barrow, partial to and strongly biased and prejudiced in favor of the defendants? Answer: Yes.

6. What were the damages done by fire to the property of plaintiffs included in the policies? Answer: $5,172.98 and interest."

The court below upon the verdict signed judgment. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material facts and necessary assignments of error will be considered in the opinion.

H. G. Connor, Jr., M. S. Strickland and Finch, Rand & Finch for plaintiff.

W. A. Lucas and Manning & Manning for defendants.

CLARKSON, J. We think the crux of this action is embodied in the following exceptions and assignments of error made by defendants: "(1) The court erred in admitting in evidence, over the objection of the defendants, aptly made, testimony tending to prove the sound value and loss and damage to the property otherwise than as shown by said appraisal agreement and award made thereunder, for that both parties were bound by the award thus made; and the said award determined the amount of sound value and the loss or damage; and (2) the refusal of the court below, on motion of defendants at the close of the plaintiff's evidence and at the close of all the evidence for judgment as in case of nonsuit, and for any further recovery than the judgment tendered in the answer." C. S., 567.

Under the facts and circumstances of these actions we think the court below correctly overruled these exceptions and assignments of error. These are actions in effect to set aside the award for fraud, corruption, undue influence and bias.

In *Miller v. Farmers Federation,* 192 N. C., at p. 146, we find: "Parol testimony cannot be admitted to contradict, add to, or vary a written contract in the absence of fraud, ignorance, mistake or other available defense, warranting a rescission or cancellation. This rule is intended for the 'protection of the provident' and not for the 'relief of the negligent.' *Patton v. Lumber Co.,* 179 N. C., 103; *Watson v. Spurrier,* 190 N. C., 729."

We find also in the authorities that although the contract is in writing and signed that conditions and collateral agreements under certain circumstances are permitted to be shown. In *Herndon v. Ins. Co.,* 110 N. C., at p. 284, it is said: "If the award was signed when it was incomplete, because of the false assurance given by one of the adjusters, the others who were present acting in concert with him, will not be allowed to claim for their companies that they shall be permitted to reap the benefit of the falsehood."

In *Kelly v. Oliver,* 113 N. C., at p. 444, it is said: "This being so, it was competent for the defendant to show that, although he signed the instrument, it was not to go into effect, as to him, until the plaintiff had procured the signatures of twenty others to the same. This does not contradict the terms of the writing, but amounts to a collateral agreement, postponing its legal operation until the happening of a contingency. *Penniman v. Alexander,* 111 N. C., 427." *Mercantile Co. v. Parker,* 163 N. C., 275; *Buie v. Kennedy,* 164 N. C., 290; *Thomas v. Carteret,* 182 N. C., at p. 378; *White v. Fisheries Co.,* 183 N. C., at p. 229-30; *Watson v. Spurrier,* 190 N. C., at p. 730. See *Bank v. Winslow,* 193 N. C., 470; *Crown Co. v. Jones,* 196 N. C., 208; *Stockton v. Lenoir,* 198 N. C., 148.

On this aspect, that the award was signed conditionally and the aspect of fraud, and the aspect that Barrow was not a disinterested appraiser, the evidence was to the effect: R. D. Gladding testified in part: "Q. What took place between you and Mr. Barrow before you signed that appraisal agreement? A. I asked Mr. Barrow would my signature on that paper prevent Mr. Hill from taking the matter further to Mr. Rose if he so desired if he was dissatisfied. Mr. Rose was the umpire chosen by Mr. Barrow and myself. Mr. Barrow told me in his opinion he could, and I signed the paper. Q. Why did he say he could? A. Mr. Barrow told me he had appraised several buildings before, and I assumed he knew that point of the matter, and I relied on that before I signed it. I would not have signed it if he had not told me that. Immediately after signing it I took one copy of it and showed it to Mr. Hill and told him that was the result of our appraisal, but that if he was not satisfied he could take the matter to Mr. Rose for final judgment, or words to that effect. In consequence of what Mr. Hill said I went back down stairs and found Mr. Hoff (manager of Southern Adjustment Bureau) and Mr. Barrow, and took them to Mr. Hill's office. Mr. Hoff was an insurance man, is all I know. Q. What did Mr. Hill state to them in reference to what you had told him? A. He said that he was not satisfied with the appraisal, and the understanding was that he could submit it to Mr. Rose. That is what he said at first; that was the substance of it. He asked to take it up to Mr. Rose. I don't know exactly what Mr. Hoff said to that. I don't remember exactly what he did say except I know that everything that was said in connection with that was refused by Mr. Hoff."

On 20 November, 1928, Gladding wrote Barrow: "When you and I met to appraise the loss sustained by Mr. D. M. Hill, of Wilson, N. C., in a recent fire, his residence, it was distinctly stated by me and acquiesced in by you before I signed the appraisal agreement, that this report would not be binding upon Mr. Hill without his assent. I asked you the direct question if it would be binding upon Mr. Hill without his assent before I signed it, and you stated that it would not be. I repeated this statement in the presence of Mr. Hill and Mr. Hoff, and you again assented to it, or that such was your understanding. I now learn that the Southern Adjustment Bureau, acting for the companies, takes the position that notwithstanding this distinct understanding between us, these figures are binding upon Mr. Hill without any further act on the part of Mr. Rose or any one else. In view of the facts herein stated, I take this opportunity to say to you that I withdraw my signature from the said appraisal agreement. I never would have signed the same but for the understanding which I had, and I think that you know I would not."

The testimony of Gladding was corroborated by Hill and the following portion of letter, dated 21 December, 1928, relating to the matter, written to Hoff by Hill, was introduced in evidence: "I do not believe that you will controvert that fact that one of the appraisers, Mr. Gladding, stated in the presence of yourself, Mr. Barrow and me, that at the time the purported estimate was made, that it was conditional; and you stated that if that were the case, it should be threshed out then, and asked me what I thought should be done. I stated to you, that while I did not know Mr. Barrow, I presumed he was a reputable contractor and that it would be entirely agreeable to me for him to put my home back in as good condition as it was before the fire; that all I wanted was the amount of the loss I had suffered—and Mr. Barrow spoke up and said, 'No, I wouldn't come here and do it for three times that amount.' I then asked you if it would be agreeable for Mr. Rose, whom the appraisers had first chosen as an umpire, to pass upon the estimate, and you declined. I then asked if it would be agreeable to get Jones Bros. and any other contractor to come over and go over the estimates with Mr. Gladding and Mr. Barrow, and you declined, and then walked over to my side of my desk and picked up one of the estimates or purported appraisals, folded, put it in your pocket, and after some parting remarks, stated that you hoped I would have no personal feeling toward you, and departed."

This evidence of Gladding and Hill was not denied by Barrow, although he was at the trial. Hoff was manager of the Southern Adjustment Bureau, which acted as adjuster for fire insurance losses. He testified in part: "I have been with the Southern Adjustment Bureau since 1921. I was the representative or agent or adjuster of the companies having insurance on Mr. Hill's house, and we appointed Mr. Barrow appraiser for the insurance company. . . . Mr. Hill asked that we call in Mr. Rose, who was selected as umpire, and I told him we could not do that since the appraisers had agreed. I know Mr. W. B. Barrow. He was then and is now general contractor in Raleigh. He has acted as appraiser in fire damages to buildings that have been handled by our Raleigh office. . . . I received that letter from Mr. Hill, dated 21 December, 1928. I don't know that I answered it. I don't think that letter required a reply. So far as I know I did not answer it. I can tell from the file, but I doubt whether there was a reply to either one of those letters. After examining the file, so far as I know I did not. That was subsequent to the appraisal, and I regarded the appraisal as final. . . . *Mr. Barrow had been appraising in the neighborhood of six a year, maybe four and maybe six,* depends on what territory the fire was in. We have used Mr. Barrow as far away from home as Currituck, but hardly ever. . . . He has a *pretty good reputation in the Southern Adjustment Bureau for being a pretty good appraiser.* . . . I will not say that Mr. Barrow is always the low man. If you ask me, he usually is. *He is usually appointed by the Southern Adjustment Bureau, and is usually the low man.*"

It will be noted that under the terms of the policy the appraisers selected by the parties must be *disinterested.* "In case the insured and this company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a *competent and disinterested appraiser.* The appraisers shall first select a *competent and disinterested umpire,*" etc.

In Sturges Commercial Arbitrations and Awards (1930), ch. 148, at p. 371, citing numerous authorities, we find: "More general qualifications for arbitrators and umpires may be summarized by a statement to the effect that they shall not be 'interested,' 'biased,' or 'prejudiced' either at the time of accepting the office of arbitrator or umpire or during the proceedings. To be 'disinterested' it is said requires not only a lack of pecuniary interest in the outcome of the matter to be decided, but also freedom from 'bias and prejudice.' Cases have frequently arisen under appraisal clauses in fire insurance which require that appraisals and loss and damage shall be made by appraisers who are competent and 'disinterested.' Evidence that the appointee of the insurance company under such a clause is frequently employed to appraise such losses by the appointing company or other insurance companies, and that he is paid a substantial fee therefor, is not conclusive that he is disqualified. It may, however, be evidence to go to the jury on the question of his qualifications."

The case of *Hall Bros. v. Western Assurance Co.,* 133 Ala., 637, 32 So., 257, is practically on all fours with the case at bar. At p. 640 we find: "In other words, if it be true that the appraiser named by defendant, although his selection was agreed to by the plaintiffs, was not disinterested, and this was known to defendant, but unknown to the plaintiffs at the time of entering into the agreement of submission, they are not bound by the agreement to arbitrate, and are at liberty to prosecute this suit. This would be a fraud upon the plaintiffs, and an agreement of submission to the appraiser is not a defense to this suit. *Hickerson v. Royal Ins. Co.,* 32 L. R. A., 172; *Brock v. Dwelling House Ins. Co.,* 47 Am. St. Rep., 562; *Bradshaw v. Agricultural Ins. Co.,* 32 N. E. Rep., 1055." See 143 Ala., 168, 38 So., 853.

We think the evidence in regard to Barrow's relationship with the Southern Adjustment Bureau sufficient to go to the jury. The defendants excepted and assigned error as to issues 2d, 3d, 4th and 5th. These cannot be sustained.

The issues submitted to the jury are practically those set forth in *Perry v. Insurance Co.,* 137 N. C., 402. The jury assessed the damage as $5,174. The contested award was $2,445.79. There was evidence to the effect that the house destroyed was worth before it was burned $9,200. The percentage of damage after it was burned was 85 per cent. We think this inequality, with other evidence, a circumstance to be considered by the jury. *Perry v. Ins. Co., supra,* at p. 407.

In *Knight v. Bridge Co.,* 172 N. C., at p. 397-8, speaking to the subject, it is said: "In *Perry v. Ins. Co.,* 137 N. C., 407, the following charge was approved: 'If the award is so grossly and palpably inadequate, that is, so grossly and palpably small and out of proportion to the amount of actual damage as to shock the moral sense and conscience and to cause reasonable persons to say he got it for nothing, then the jury may consider this as evidence tending to show fraud and corruption or strong bias and partiality on the part of the arbitrators'; and the Court said in *Leonard v. Power Co.,* 155 N. C., 16: 'The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award, but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issue relating to fraud and corruption or partiality and bias'; and in *King v. R. R.,* 157 N. C., 65: '*When due weight is given to these matters, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and if grossly inadequate it alone is sufficient to carry the question of fraud or undue influence to the jury*'; *and these cases were approved in Causey v. R. R.,* 166 N. C., 5." (Italics ours.)

The defendants' prayer for instruction: "The court charges you that there is no evidence that the award was procured by fraud," cannot be sustained. Fraud is not easily defined. "It is, indeed, a part of equity doctrine not to define it," says *Lord Hardwicke,* "lest the craft of men should find a way of committing fraud which might escape such a rule or definition." *Oil Co. v. Hunt,* 187 N. C., 159; *Furst v. Merritt,* 190 N. C., at p. 404. It is said: "Definitions are a bog for the unwary and a chart for the wicked."

Speaking to the subject in the *Perry case, supra,* at p. 406, is the following: "There are two kinds of fraud which will vitiate an award; positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the fact of its existence to be clearly indicated. 'A common case of inferential fraud is where the award is obviously and extremely unjust.' Morse on Arbitration and Award, 539. 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators.' *Goddard v. King,* 40 Minn., 164."

This arbitration is under the terms of the policy. It may be noted that Laws 1927, ch. 94, makes provision for arbitration by agreement of parties.

The evidence was to the effect: That the award was signed conditionally by Gladding, with the false assurance that it was not final and the umpire could be called in, and the refusal of defendants to allow this to be done; the defendants' appraiser being practically in their employ to make appraisals for four to six a year, therefore not being disinterested, this unknown to plaintiff; the inexperience of the plaintiffs' appraiser and Barrow's taking advantage of this fact, and other facts and circumstances, were sufficient to sustain the allegations of the complaint and the verdict.

We think the position here taken amply supported by the decisions of this and other states. In the exceptions and assignments of error as to the admission of evidence, the refusal of defendants' prayer for instructions and in the charge of the court below, we can see no prejudicial or reversible error.

No error.

C. W. BUNDY, RECEIVER OF TRIPLETT LUMBER COMPANY, v. COMMERCIAL CREDIT COMPANY.

(Filed 25 March, 1931.)

1. **Usury A a—Contract to pay certain sum for accounts of corporation held contract to loan money and not to purchase accounts under the facts.**

   Where a credit corporation under a "covering agreement" agrees to "purchase" the accounts of a wholesale corporation "as may be acceptable" and to pay therefor one hundred per cent of their face value less certain charges, though denominating itself a purchasing contractor, it is in effect a loan of money and is condemned by our usury statute when a greater rate than 6 per cent is charged for the money advanced or loaned.

2. **States A a—It will be presumed that parties contracted with reference to law of State where contract would be valid.**

   Where a contract is unlawful under the laws of this State, but lawful under the laws of another State wherein the contract was completed, every presumption is against an intention to violate the law, and it will be presumed that the parties contracted with reference to the laws of the State in which the contract would be valid.

3. **Same—In this case held: contract was made in another state and its laws control unless it was there executed to avoid our usury law.**

   Where a contract is in effect a loan of money contrary to our usury laws and is executed by the local agent of the lending corporation in North Carolina subject to the approval of the home office in another State where the rate of interest is permissible, the *lex loci* of the State where the contract was finally completed is controlling unless it was therein completed as a device to avoid the usury laws of this State, and whether it was so executed as a device to avoid our usury laws is a question of fact for the jury.

4. **Same—Enforcement of contract valid in state where executed but usurious in this State is not against public policy.**

   A contract made at a permissible rate of interest in another State, but contrary to the usury laws in this State, when not a device to evade our law, is enforceable and is not considered as against public policy.

5. **Same—Stipulation in contract that laws of certain State should control is immaterial where contract is executed in another State.**

   Where a contract contains a stipulation that it should be governed by the laws of a certain State other than the State in which the contract is executed, and it appears that the parties did not contemplate the making or performance of the contract in the State whose laws are agreed to be controlling, the stipulation will be deemed immaterial.

6. **Usury C d—Directed verdict as to amount recoverable under usury statute held error, admission in record being insufficient therefor.**

   The plaintiff in his action to recover for usurious rate of interest paid and received by the lender is entitled to recover double the amount of the interest so paid and received, and an instruction to the jury that fails to give him this right (C. S., 2306) is prejudicial to him and is reversible error. Admissions in this record held insufficient as a basis for a directed verdict of a specific amount.

CIVIL ACTION, before *Stack, J.*, at Fall Term, 1930, of MECKLENBURG.

The Triplett Lumber Company was a North Carolina corporation with its office and place of business in Charlotte, and engaged in the wholesale lumber business. In the due course of its business it purchased lumber from various mill owners and had the same shipped directly to its customers. The company paid mill owners for the lumber, and upon shipment charged the customers with the purchase price. Apparently the lumber company was doing a large and profitable business, and hence it was compelled to have a large amount of money available to carry on its extensive operations. On 2 September, 1926, the lumber company made an agreement with the defendant Commercial Credit Company. This agreement is usually referred to as a "covering agreement" and provided in substance that the lumber company would sell and the Credit Company purchase all such open accounts, notes, drafts, acceptances, leases, mortgages and choses in action belonging to the Lumber Company or accepted by it in due course of trade. The Credit Company agreed to purchase such evidences of indebtedness "as may be acceptable" and to pay therefor one hundred per cent of the face value thereof less certain charges. The purchase price of such accounts was to be paid as follows: (a) 77 per cent of net face value upon acceptance by the Credit Company; (b) the remaining 23 per cent to be paid in cash to the Lumber Company when such evidences of indebtedness were actually paid by the customers or purchasers of the lumber from the Lumber Company. The agreement further provided that the defendant should perform certain services which are not deemed material to this controversy. The compensation provided for the Credit Company by the terms of the agreement was 1/30 of 1 per cent of the net face value of accounts for each day, etc. It was also provided that the Lumber Company should send all original checks, drafts, notes and other evidences of payments received by it from its customers to the office of the defendant in Baltimore, Md. The following clauses appear in the agreement: (1) All acts, agreements, certificates, assignments, transfers and transactions hereunder, and all rights of the parties hereto shall be governed as to validity, enforcement, interpretation, construction, effect, and in all other respects by the laws and decisions of the State of Delaware. (2) This agreement shall not become effective until accepted by its duly authorized officers of second party (defendant Credit Company) at Baltimore, Md.

The record shows that the agreement "was accepted in Baltimore, Md., by Commercial Credit Company, this 3 September, 1926."

There were various other documents introduced in evidence disclosing the method of business transacted by the parties. When the Lumber Company sent notes, acceptances, etc., to the Credit Company the Credit Company would issue a check in accordance with the terms of the agreement drawn upon its bank account in Baltimore, Md., and these checks would be forwarded by mail to the Lumber Company at Charlotte and used in the due course of business.

In the course of time the Lumber Company became insolvent, and thereafter, on 12 March, 1929, the plaintiff Bundy was made permanent receiver of the Triplett Lumber Company. The receiver undertook to collect accounts due the Lumber Company and found that many of these accounts were claimed by the defendant Commercial Credit Company, and that said defendant had notified the debtors not to pay the receiver. Thereupon the receiver instituted this action against the defendant to assert in the receivership proceedings any right, title or interest it had to said claims. The defendant filed a claim with the receiver for the sum of $12,051.40. When the complaint seeking an injunction was filed and the receivership made permanent, the defendant filed an answer setting up the contract between it and the Lumber Company and asserting that it was the owner of and entitled to the proceeds of certain accounts. The plaintiff filed an amended complaint and alleged that said contract was usurious in that it resulted in an interest rate of approximately fifteen per cent. It was further alleged that the signing of the contract in Baltimore, Md., was a scheme and device to evade and set at naught the usury laws of North Carolina. Whereupon, the plaintiff demanded judgment against the defendant for $19,830.78. The defendant filed a reply to the amended complaint, alleging (a) that the transaction contemplated by the contract was a purchase and not a loan; (b) that the express terms of the agreement provided that it should be governed by the laws of Delaware which were specifically pleaded; (c) that the law of Maryland, where the contract was actually executed, governed the dealings between the parties. The Maryland law was also specifically pleaded. A reply was filed to the amended answer and a replication to the reply and various other pleadings filed setting forth the various aspects of the cause of action of plaintiff and the various defenses interposed by the defendant.

The cause came on for trial upon the following issues:

1. "Is the plaintiff the owner of the accounts referred to in the complaint, as alleged in the complaint?"

2. "Did the defendant knowingly take, receive, reserve or charge the Triplett Lumber Company a greater rate of interest than six per cent per annum, as alleged in the amendment to the complaint?"

3. "Were the contract and dealings between the Triplett Lumber Company and the defendant governed and controlled by the laws of North Carolina?"

4. "What amount of penalty, if any, is the plaintiff entitled to recover of the defendant for usurious interest paid?"

5. "What amount is the plaintiff indebted to the defendant?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "Yes," the fourth issue "$11,000," and the fifth issue "$12,051.40."

Judgment was entered to the effect that the defendant was entitled to prove an unsecured claim in the sum of $1,051.41.

From judgment so rendered both parties appealed.

John M. Robinson and Hunter M. Jones for plaintiff.

Duane R. Dills, New York City, J. Laurence Jones and J. L. Delaney, Charlotte, N. C., and Jack J. Levinson, New York City, for defendant.

BROGDEN, J. The paramount questions of law to which all others are subsidiary may be stated as follows:

1. Was the agreement a Maryland or a North Carolina contract?

2. What are the rights of the parties thereunder?

The evidence bearing upon the execution of the contract is rather uncertain and indefinite. It appears that the defendant maintained a branch office in Charlotte, North Carolina, and that Mr. Murphy was in charge thereof. Mr. Triplett, president of the insolvent Lumber Company, testified with reference to the negotiations leading up to the execution of the contract as follows: "We conducted negotiations looking towards the making of the contract with the Commercial Credit Company with Mr. Murphy. He came into our office quite often prior to the contract looking for business. We made a contract with Mr.

Murphy; of course, he did not sign the contract. We conducted negotiations for the contract with Mr. Murphy in Charlotte, North Carolina. . . . I was in my office in Charlotte, North Carolina, when I signed that contract on behalf of Triplett Lumber Company. . . . Those signatures were witnessed by Mr. Murphy in our office." The foregoing is substantially all of the evidence offered in behalf of plaintiff touching the actual execution of the agreement.

The defendant offered the following testimony of the assistant secretary: "I first saw this contract in Baltimore. It came through the mail to my desk. I signed it. F. M. Nicodemus, treasurer of the company at that time, also signed it on 3 September, 1926. It was signed in duplicate. After signing it the duplicate was forwarded by me to the Triplett Lumber Company; also copy of the contract for our files and the original copy was made a part of my permanent records in the Baltimore office. I spoke of forwarding; I mean mailed it."

"By the great weight of authority it is held that, in a case like the present one, every presumption is against an intention to violate the law, so that, where notes are executed in one State and payable in another, the parties will be presumed to have contracted with reference to the law of the place where the transaction would be valid rather than in view of the law by which it would be illegal, provided, however, that there is no evidence of bad faith or of an intention to evade the usury law of the latter State. Therefore, when a contract is usurious by the law of the State wherein it was made, but not according to that of the State wherein it is to be performed, the parties will be presumed to have contracted with reference to the law of the latter State, and the contract will be upheld, subject to the conditions of good faith just set forth." *Zimmerman v. Brown,* 166 Pac., 924. Moreover, it is a generally accepted principle that "the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract." Wharton Conflict of Laws (3d ed.), sec. 422(a); *C. I. T. Corporation v. Sanderson,* 43 Fed., 2d, 985.

Applying these principles of law to the facts, it is clear that the contract was executed in Baltimore, Maryland, because the last act essential to the completion of the agreement was performed at that place. Hence, this was the place of execution, and, nothing else appearing, it would follow that it was the intention of the parties that the validity and performance thereof should be governed by the laws of Maryland. But something else does appear. It is alleged that the contract was executed in Baltimore, Maryland, for the purpose of evading the usury laws of this State, and that selecting Baltimore, Maryland, as the place of execution and completion of the contract was in bad faith and constituted a scheme or device purposely designed to enable the defendant to charge, receive and collect interest in excess of six per cent. Therefore, an issue of fact was sharply drawn. Such issue of fact has not been submitted to a jury. The issue actually submitted being the third issue, embraced a conclusion of law only and a new trial must be awarded.

In arriving at a correct conclusion with respect to the second proposition of law, it is necessary to determine whether the contract in controversy contemplates a purchase of accounts and evidences of indebtedness or a loan of money. Deeming a discussion of the evidence inadvisable, as a new trial must be awarded, suffice it to say that the Court is of the opinion that the agreement contemplates a loan, and that the parties themselves placed such a construction upon the instrument in the correspondence appearing in the record. *Cole v. Fibre Co., ante,* 484, where the authorities are assembled. The identical contract was construed by the Circuit Court of Appeals in *Brierly v. Commercial Credit Co.,* 43 Fed. (2d), 724-730. The Court held that the instrument contemplated a loan and not a purchase. A contrary conclusion was reached *In re Eby,* 39 Fed. (2d), p. 76, by the District Court for the Eastern District of North Carolina in construing a contract made by the defendant similar to the one involved in this controversy. *Seeman v. Philadelphia Warehouse Co.,* 274 U. S., 403, 71 Law Ed., 1123. The covering agreement provided that the agreement should be governed "as to the validity, enforcement, interpretation, construction, effect, and in all other respects by the laws and the decisions of the State of Delaware." However, the record does not disclose that any transaction took place in Delaware or that the parties even contemplated either the making or the performance of the contract in said State. Therefore, the stipulation is deemed immaterial. *Brierly v. Commercial Credit Co., supra.*

Thus, we have a contract for the loan of money to a citizen of this State, executed in the State of Maryland, and such contract is under attack upon the ground that it was made in bad faith and with intent to evade the usury laws of North Carolina. Hence, the final question is what are the rights of the parties under such contract? The general principle recognized in all jurisdictions is that ordinarily the execution, interpretation and validity of a contract is to be determined by the law of the State or county in which it is made. This principle was first considered by this Court in 1821 in the case of *McQueen v. Burns,* 8 N. C., 476. Thereafter various aspects of the question have been

discussed in the following cases: *Arrington v. Gee,* 27 N. C., 590; *Davis v. Coleman,* 33 N. C., 303; *Houston v. Potts,* 64 N. C., 33; *Commissioners v. R. R.,* 77 N. C., 289; *Williams v. Carr,* 80 N. C., 295; *Armstrong v. Best,* 112 N. C., 59; *Meroney v. Loan Association,* 112 N. C., 842; *Meroney v. Loan Association,* 116 N. C., 882; *Faison v. Grandy,* 128 N. C., 438; *Smith v. Ingram,* 130 N. C., 100; *Cannaday v. R. R.,* 143 N. C., 439; *Rankin v. Mitchem,* 141 N. C., 277; *Burrus v. Witcover,* 158 N. C., 384; *Fashion Co. v. Grant,* 165 N. C., 453; *Ripple v. Mortgage Corp.,* 193 N. C., 422. In *Cannaday v. R. R.,* 143 N. C., 439, the Court quoted with approval the following statement of law: "It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention." The Maryland statute with reference to usury has been construed by the Court of last resort in that State to mean that "lenders and corporate borrowers are free to agree upon any rate of interest above the regular limit of the statutory law." *Carozza v. Federal Finance Co.,* 131 Atlantic, 332; *Penrose v. Carlton National Bank,* 127 Atlantic, 856.

Notwithstanding the general rule, there are certain exceptions thereto which have been adopted in this jurisdiction and intimately wrought into the fabric of our law. These exceptions are classified as follows, in *Burrus v. Witcover,* 158 N. C., 384: "The general doctrine that a contract, valid where it is made, is valid also in the courts of any other country or State, where it is sought to be enforced, even though had it been in the latter country or State it would be illegal and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the State of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the State of the forum, that is, contrary to its Constitution or statutes, and (4) when the contract violates the public policy of the State of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any State or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return." But there are certain other exceptions which should be added to those set out in the *Burrus case.* They are: (a) when the contract is made in a foreign State or country with the intent and purpose to evade the usury laws of this State; (b) when a loan is made in a foreign State or country and is secured by a lien upon real estate in this jurisdiction, the interest laws of North Carolina are applicable. *Meroney v. Building and Loan Association,* 112 N. C., 842; *Meroney v. Building and Loan Association,* 116 N. C., 882; *Faison v. Grandy,* 128 N. C., 438; *Smith v. Ingram,* 130 N. C., 100. The mere fact that a loan was made to a citizen of this State by a citizen of a foreign State and a rate of interest in excess of six per cent was reserved or charged, does not necessarily offend the public policy of this State. The *Ripple case, supra,* holds that an agreement by the parties for the payment of interest in excess of the legal rate is in violation of our statute and contrary to the public policy of this State, and furthermore, that such agreement standing alone is void. But this declaration of law applies to specific and independent contracts for excess of interest and upon correct construction is not an authority for the position that a contract made in a foreign State at a higher rate of interest than allowed by law in this State is necessarily contrary to public policy.

The plaintiff contends that the assignment of accounts was in the nature of a chattel mortgage upon property in this State, and that hence North Carolina was the situs of the security. Even if it be conceded that the principle governing real estate security applies to personal security, it appears from the evidence that the accounts and evidences of indebtedness were sent to Baltimore, Md., thus establishing a situs in Maryland rather than in North Carolina.

Summarizing the various aspects of the case, if, upon a further trial, the jury shall find that the contract was a Maryland contract and executed in good faith with no intention of evading the usury laws of North Carolina, then the law of Maryland applies in full force to the transactions. If, upon the other hand, the jury shall find that the contract was executed in Maryland in bad faith with the purpose and intent of evading the usury laws of North Carolina, then the North Carolina law applies in full force.

The plaintiff appealed, assigning as error the following instruction given by the trial judge to the jury: "The burden is on the plaintiff to satisfy you by the greater weight of evidence, gentlemen of the jury, of such amount, if any you may find, it is entitled to recover. You may find it is entitled to recover nothing; you may find it is entitled to recover any amount up to $19,830.78; that it has satisfied you by the greater weight of evidence it is entitled to recover from the defendant." The record shows the following stipulation: "It is further stipulated that the amounts set forth in the right-hand column of said statement, aggregating $9,915.39, were paid by the Lumber Company to the Credit Company as shown by the facts hereinafter referred to." The plaintiff contends that this stipulation is equivalent to an admission that the defendant received $9,915.39 as usury, and that the penalty prescribed by statute C. S., 2306, permits recovery for twice said amount, aggregating $19,830.78. The stipulation is not specific enough to warrant the inference that said sum was paid by the Lumber Company and received by the Credit Company as excess interest. Notwithstanding, the plaintiff was entitled to recover under the statute "twice the amount of interest paid," and the exception of plaintiff to the instruction complained of is sustained. *Ripple v. Mortgage Co.,* 193 N. C., 422; *Sloan v. Insurance Co.,* 189 N. C., 690.

There are other exceptions in the record which are neither discussed nor decided for the reason that a new trial upon all proper issues arising must be awarded, and the case should be tried upon its merits.

Plaintiff's appeal: New trial.

Defendant's appeal: New trial.

J. VERNON SMITHWICK AND J. T. SMITHWICK v. COLONIAL PINE COMPANY, INC.

(Filed 25 March, 1931.)

1. **Trial D a—Upon motion of nonsuit all evidence is to be considered in light favorable to plaintiff.**

   Upon a motion as of nonsuit all the evidence is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Highways B e—Evidence of defendant's violation of section 2621 in parking truck on highway held sufficient to be submitted to jury.**

   Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of section 2621 (a) Michie's Code of 1927, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception, section 2621(c): *Held,* under the statute and the facts disclosed by the record the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of nonsuit was error.

APPEAL by plaintiffs from *Sinclair, J.,* at November Term, 1930, of BERTIE. Reversed.

This is an action for actionable negligence brought by plaintiffs against the defendant for damages. The actions were consolidated.

The plaintiff, J. Vernon Smithwick, contends that he was driving an automobile—Dodge coach, sport model—which belonged to his father, one of the plaintiffs, J. T. Smithwick, on Route No. 90, on or about 7 April, 1928. That it was a rainy day and the road was wet and slippery. He was driving eastwardly along and over said highway, in a cautious and careful manner. That defendant's truck, headed in the same direction was "heavily loaded with lumber being parked upon the hard-surfaced portion of said State Highway No. 90, on the right-hand side thereof coming east, the plaintiff undertook to pass to the left of said truck and to go around the same; that the said truck obstructed the view of persons approaching from the opposite direction, and as plaintiff was on the eve of passing said truck another car suddenly appeared coming in the opposite direction and it became necessary, in order to save his own life and the life of his wife, who was a passenger with him in said automobile, and to avoid a head-on collision with the said approaching automobile, for the plaintiff to suddenly turn his automobile to the right side of said highway, and owing to the fact that the defendant's said truck was unlawfully, negligently and carelessly parked on the said highway and obstructed the passing and repassing of automobiles thereon, and thereby obstructing and interfering with the public traffic on said highway and blocking the same, the automobile driven by plaintiff was violently thrown against said truck and lumber thereon, and the said automobile was entirely demolished and the plaintiff was violently thrown out of said automobile and seriously injured." That his wife was also injured.

The defendant denied any negligence and set up the plea of contributory negligence, and also set up a counterclaim against plaintiff for injury to the truck.

J. H. Mathews for plaintiffs.
S. L. Arrington for defendant.

PER CURIAM. At the close of plaintiffs' evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below, at the close of all the evidence granted the motion of defendant. In this we think there was error.

Michie's Code of N. C., of 1927, annotated, p. 914, sec. 2621, sec. 66 (Public Laws 1927, ch. 148, sec. 24(a) and (c), in part is as follows: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway: *Provided,* in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in both directions upon such highway: *Provided further,* that in no event shall any person park or leave standing any vehicle whether attended or unattended upon any highway bridge. . . . (c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

The defendant contends that under all the facts it came within the provisions of (c) quoted above.

"It is a well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Nash v. Royster,* 189 N. C., at p. 410.

We think, from the above quoted statute and the facts disclosed by the record, the matter should have been submitted to the jury under proper instructions. As the case goes back to be tried by a jury, we will not discuss the facts. The judgment of the court below is

Reversed.

W. J. TEEL v. L. E. KNOTT.

(Filed 25 March, 1931.)

Justices of the Peace E b—Application for writ of recordari held properly refused in this case.

Where the appellant from the judgment of a justice of the peace has given notice of appeal and paid the justice's fee, together with the clerk's fee for docketing the appeal, but no appeal has been docketed in the Superior Court and no fee received by the clerk nor notice of appeal given him, and application for a writ of *recordari* after the lapse of ten terms of the Superior Court is properly denied. *Helsabeck v. Grubbs,* 171 N. C., 337, cited and applied; *Blacker v. Bullard,* 196 N. C., 696, cited and distinguished.

APPEAL by defendant from *Small, J.,* at September Term, 1930, of PITT.

Petition for *recordari* to bring case from court of justice of the peace to Superior Court of Pitt County for trial *de novo.*

The case was properly before the justice of the peace, who heard it and rendered judgment therein, 31 August, 1929, in the presence of the parties and their counsel. The defendant, through his counsel, in open court, gave notice of appeal, and paid to the justice his fee, together with the clerk's fee for docketing the appeal. No appeal has yet been docketed in the Superior Court of Pitt County, ten regular terms of which intervened between the rendition of the judgment in the justice's court and the filing of application for *recordari,* 10 September, 1930. The clerk of the Superior Court has received no notice of the appeal, and no fee for docketing same has been paid or tendered to him.

Upon the foregoing findings, which appear in the judgment of the Superior Court, the application for writ of *recordari* was denied.

R. T. Martin for plaintiff.
John Hill Paylor for defendant.

STACY, C. J. Affirmed on authority of *Helsabeck v. Grubbs,* 171 N. C., 337, 88 S. E., 473, and *MacKenzie v. Development Co.,* 151 N. C., 276, 65 S. E., 1003.

Blacker v. Bullard, 196 N. C., 696, 146 S. E., 807, is distinguishable.

Affirmed.

FIRST CAROLINAS JOINT STOCK LAND BANK OF COLUMBIA AND RALEIGH BANKING AND TRUST COMPANY v. NELSON A. COURTWAY, HENRIETTA D. COURTWAY, EDWARD J. BARBER AND OAKLEY WOOD, AS EXECUTORS AND TRUSTEES OF THE ESTATE OF JAMES BARBER, AND J. B. THOMAS, AS EXECUTOR OF THE ESTATE OF J. C. THOMAS, J. TALBOT JOHNSON, S. B. RICHARDSON, W. A. WAY, S. O. MILLER, W. N. HUTT, M. H. FOLLEY, MARLBORO PEACH ORCHARDS, INC., AND J. McNEAL JOHNSON, DEFENDANTS.

(Filed 1 April, 1931.)

1. **Frauds, Statute of, E a—Signature of secretary in official capacity to minutes of board is not sufficient as signature of directors.**

The minutes of a meeting of the board of directors of a corporation voting in favor of indemnifying its secretary against loss in assuming a corporate indebtedness, signed only by the secretary in his official capacity is not a sufficient writing to prevent the operation of the statute of frauds, it being necessary that the writing be signed by the party to be bound or by his authorized agent, and the payee of the note evidencing the indebtedness cannot hold them personally liable.

2. Indemnity A a—Where indemnity contract purports to be for benefit of payer only, payee may not claim it was made for his benefit.

Where the directors of a corporation vote for and pass a resolution each pledging his individual liability in proportion to the amount of stock he holds in the corporation as security for its secretary in obtaining a loan on his individual note for the benefit of the corporation, the payee of the note cannot enforce the individual liability of the directors upon the ground that he was the beneficiary of the transaction when it appears from the resolution itself and from the interpretation placed thereon by the parties that only the maker of the note was the beneficiary of the resolution in exclusion of the payee.

3. Subrogation A c—Where contract of indemnity is void as to payee he is not entitled to subrogation to rights of obligee.

Where a contract indemnifying the maker of a note against loss thereon is void as to the payee of the note on account of the operation of the statute of frauds, the payee may not claim to be subrogated to the rights of the maker under the contract of indemnity.

CIVIL ACTION, before *Barnhill, J.,* at March Term, 1930, of MOORE.

The Marlboro Peach Orchards was a North Carolina corporation and owned a tract of land in Moore County, containing about 512 acres of land. This corporation operated the property as a farm and peach orchard and maintained certain buildings upon the property, together with farming utensils and livestock. The corporation was indebted to different people in various amounts, and on 5 December, 1924, a meeting of the board of directors was held for the purpose of devising ways and means to secure money to operate the farm and to pay certain indebtedness. The directors participating in the meeting were J. C. Thomas, S. B. Richardson, W. A. Way, J. T. Johnson, S. O. Miller, W. N. Hutt, M. H. Folley, and N. A. Courtway. Thomas was president and Courtway was secretary of the corporation. A resolution was duly adopted containing the following provisions: (a) that it was advisable for the corporation to borrow $50,000; (b) that as the corporation could not borrow from a land bank in its own name, it was the sense of the directors that the property should be conveyed to some third party in order to secure the loan in the name of an individual, and that for such purpose the property of the corporation should be conveyed to the individual selected who should execute a note evidencing the loan and a deed of trust upon the property, and thereafter reconvey the property to the corporation; (c) N. A. Courtway, secretary and assistant manager of the company, having signified his willingness to procure the loan in his individual capacity, "provided the directors would secure him against loss by reason thereof," it was resolved that the proper officers of the company be directed to convey the property of the corporation to N. A. Courtway in fee, and that said Courtway be authorized and instructed to execute a note and deed of trust to the

Joint Stock Land Bank for a loan of $50,000, pledging the real estate to be conveyed to him by the corporation as security; (d) It was further resolved that "each of the directors present shall be, and they do hereby pledge themselves to the said N. A. Courtway for an amount equal to their respective shares of stock in the Marlboro Peach Orchards, Inc., as security to the said N. A. Courtway against any loss, claim or demand from such Land Bank by reason of his note executed for said loan, and that said loan shall be construed as the first obligation of the Marlboro Peach Orchards, Inc., until such time as the same is fully paid off and discharged," etc.

All of the directors voted for the adoption of the resolution. The minutes of the meeting show that James Barber was a director, but the uncontradicted testimony of the secretary was to the effect that Barber was not in fact a director but a stockholder, and that his name was put in the minutes simply to show that he was present at the meeting. In consequence of the resolution the officers of the corporation applied to the plaintiff for a loan of $50,000. The plaintiff declined to loan $50,000 upon the property, but agreed to make a loan of $40,000. The commitment from the plaintiff to the corporation stated that the officers of the plaintiff bank estimated the property to be worth $100,000, and further stated, "We all know that the loan is perfectly safe at $50,000." But by reason of the fact that the loan would doubtless be scrutinized by the Farm Loan Board in Washington, it was thought advisable that the loan should be reduced to $40,000. The commitment from the plaintiff to the corporation further stated: "We will expect you to work out a plan by which at least the directors of the existing corporation shall become parties to the note." On 28 January, 1925, the defendant Courtway, replying to the commitment of plaintiff, sent the plaintiff a copy of resolution adopted by the board of directors on 5 December, stating that the corporation would accept the loan in the sum of $40,000 with the understanding that there should be no personal liability upon the directors of the corporation. The plaintiffs submitted the proposition as to whether the directors would be personally bound by the resolution to its attorneys and were advised on 31 January, 1925, that they did not think the resolution passed by the Marlboro Peach Orchards Corporation would be sufficient to bind the directors personally for the payment of the note. Thereafter, on 9 February, 1925, the corporation delivered a deed to said property to the defendant Nelson A. Courtway. On the same day a deed of trust upon the property from Nelson A. Courtway and his wife, Henrietta D. Courtway, was probated, conveying the property to the Raleigh Banking and Trust Company as trustee for the plaintiff to secure a note of $40,000. On the same day Courtway and wife delivered a warranty deed for the property reconveying the same to the Marlboro Peach Orchards.

Time went on and the Marlboro Peach Orchards and Nelson A. Courtway both became insolvent. During the fall of 1928 the land was sold under a second mortgage or deed of trust to the defendant, J. McNeal Johnson. Subsequently on 26 June, 1929, this action was brought against the defendants to foreclose the deed of trust and to recover the full amount of said indebtedness against the individual defendants. The allegations of the complaint proceeded upon the theory that the directors of the company entered into a joint enterprise with the plaintiff for the purpose of securing said loan and that said Courtway executed the note and deed of trust as agent for the other defendants. James Barber died before the suit was instituted and his executors and trustees were made defendants. J. C. Thomas, president of the corporation died and his executor was made a party.

The following issues were submitted to the jury:

1. "Did the defendants, J. C. Thomas, J. Talbot Johnson, S. B. Richardson, W. A. Way, S. O. Miller, W. N. Hutt and M. H. Folley contract and agree to and with the defendant, Nelson A. Courtway, to save the said Nelson A. Courtway against any loss, claim or damage from such bank as should advance said Nelson A. Courtway a loan upon the lands conveyed to said Courtway by the Marlboro Peach Orchards, Inc., to the extent of their respective stock holdings in the Marlboro Peach Orchards, Inc., as set out in the resolution offered in evidence, as alleged?"

2. "If so, was said resolution forwarded to the plaintiff bank which advanced said loan, with the authority and the approval of said defendants, prior to the making of said loan?"

3. "If so, did said plaintiff bank, in making said loan, rely upon said resolution as a material consideration therefor and as security thereto?"

4. "Are the defendants, Nelson A. Courtway and Marlboro Peach Orchards, Inc., insolvent as alleged?"

5. "Was the procurement of said loan, and the conveyance and reconveyance of said property, as set out in said complaint, pursuant to and a part of a joint enterprise on the part of the individual defendants other than Henrietta D. Courtway and Edward J. Barber as alleged?"

6. "Did said bank, in making said loan, act upon the assurance and security of said individual defendants as embraced in said resolution, and rely upon the individual responsibility of said directors as provided for in said resolution as a material consideration therefor, as alleged?"

7. "As between the defendants who were parties to said agreement, was the said Nelson A. Courtway secondarily liable and occupy the position of an accommodation maker for the benefit of the said individual defendants, as alleged?"

8. "What amount, if anything, is due and unpaid upon said note offered in evidence?"

9. "What amount, if any, is due the plaintiff for insurance paid under the terms of said mortgage?"

10. "Had defendant J. B. Thomas, executor, fully administered the estate of his testator, J. C. Thomas, prior to notice of the plaintiff's claim, as alleged?"

The jury answered the first issue "Yes"; the second issue "No"; the third issue "No"; the fourth issue "Yes"; the fifth issue "No"; the sixth issue "No"; the seventh issue "No"; the eighth issue "$38,706.30, with interest from 1 March, 1928"; the ninth issue "$66.78 with interest from 1 July, 1928"; the tenth issue "Yes."

From judgment upon the verdict the plaintiff appealed.

Smith & Joyner, U. L. Spence, and Melton & Belser, Columbia, S. C., of counsel for plaintiff.

Varser, Lawrence & McIntyre for certain defendants.

Biggs & Broughton for estate of James Barber.

BROGDEN, J. Does a resolution, passed by the board of directors of a corporation, indemnifying the maker of a promissory note which is secured by deed of trust, against loss claim or demand by reason of the execution of the note, impose personal liability upon said directors to the payee of said note?

The plaintiff seeks to recover from the directors upon three major theories, to wit: (a) The statute of frauds does not apply to the transaction; (b) the plaintiff, Land Bank, is the contemplated beneficiary of the indemnity agreement; (c) plaintiff is entitled to recover by reason of the application of the principle of subrogation.

The first theory is overthrown by the decision of this Court in *Asbury v. Mauney,* 173 N. C., 454. It was expressly held that the minutes of a corporate meeting are not ordinarily sufficient memorandum in writing to satisfy the requirements of the statute of fraud. The Court said: "The defendant did not sign the minutes and the plaintiff must, therefore, show, in order to maintain his position, that he himself when signing the minutes as secretary of the corporation was signing as the duly authorized agent of the defendant. The first objection to this position is that the plaintiff did not purport to sign the minutes as agent for the defendant, but as secretary of the corporation, and, again, it seems to be well settled that one of the contracting parties cannot be the agent of the other for the purpose of binding him by his signature under the statute of frauds."

The second theory rests upon a line of decisions beginning with *Gorrell v. Water Co.,* 124 N. C., 328, and running through *Federal*

Land Bank v. Atlas Assurance Co., 188 N. C., 747, and *Schofield's Sons v. Bacon,* 191 N. C., 253. Summarizing the law in this line of decisions in *Bank v. Assurance Co.,* 188 N. C., 747, it was written: "Numerous decisions have established the principle, in this jurisdiction at least, that ordinarily the beneficiaries of an indemnity contract may maintain an action on said contract, though not named therein, when it appears by express stipulation, or by fair and reasonable intendment, that their rights and interests were in the contemplation of the parties and were being provided for at the time of the making of the contract."

In the case at bar it appears by express stipulation that the indemnity was designed for the exclusive benefit of Courtway. This conclusion is reinforced not only by the language of the resolution itself, but by the practical construction placed upon the instrument by the parties, in correspondence, prior to the execution of the deed of trust. The practical construction of a written instrument by the parties prior to a controversy always challenges serious consideration. *Cole et al. v. Fibre Co., ante,* 484. Indeed, the "beneficiary doctrine" does not apply to bonds of strict indemnity where the indemnity by either express terms or reasonable intendment runs solely to the benefit of the obligee. *McCausland v. Construction Co.,* 172 N. C., 708.

Nor can plaintiff recover upon the theory of subrogation. If the resolution of the directors fails to satisfy the statute of frauds so far as the plaintiff is concerned, then conventional subrogation could not grow out of a contract that never existed. In other words, the plaintiff, if entitled to recover at all, must recover upon some phase of the resolution adopted by the directors of Marlboro Peach Orchards. If that resolution, so far as the plaintiff is concerned, falls within the inhibition of the statute of frauds, then all right to recover against the individual directors fails. Thus, it becomes immaterial whether Barber was a director or not, or whether the estate of Thomas was fully administered before notice of claim.

No error.

W. W. ELLER v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 1 April, 1931.)

1. **Railroads D b—In this action to recover for injuries sustained in collision at crossing nonsuit should have been granted.**

   A driver of an automobile is required to look and listen for approaching trains before going upon a railroad grade crossing, and where the evidence tends to show that the plaintiff was riding with his curtains up and that the collision with defendant's train was in broad daylight, and that the plaintiff had an unobstructed view of the track for 300 to 400 yards, except for a passing automobile, the defendant's motion as of nonsuit should be allowed. *Batchelor v. R. R.*, 196 N. C., 84, and other cases cited and applied; *Thurston v. R. R.*, 199 N. C., 496, and other cases cited and distinguished.

2. **Same—Negligence—Contributory negligence.**

Where the evidence tends to show that the plaintiff negligently or without due regard for his own safety was personally injured in a collision of his automobile with defendant's train at a grade crossing in a town, the fact that there was also evidence of the failure of the defendant to give the usual signals required for the approach of a train to a crossing is not sufficient to deny the defendant's motion as of nonsuit, under the facts of this case.

3. **Same—Railroad company is not liable for obstruction of crossing by passing automobile.**

A railroad company will be held responsible only for such obstructions at a grade crossing as are under its control or management, and it will not be held responsible for an obstruction of plaintiff's vision by automobiles happening to pass at the time of the collision between the plaintiff's automobile with the defendant's train.

4. **Same—Evidence held insufficient to establish allegation that guard rail was negligently constructed.**

Under the facts of this case the maintenance by the defendant railroad company of a guard rail three and one-half inches from the main rail, between which the wheels of plaintiff's automobile was caught, preventing him from turning off the track in time to avoid the collision, is held insufficient evidence of negligent construction of the guard rail.

5. **Same—Failure of railroad company to maintain flagman or signaling devices at crossings in this case held not evidence of negligence.**

Although the failure of a railroad company to provide a watchman or signaling devices at a crossing may be considered by the jury in proper cases upon the question of negligence, the fact that a crossing is much used has not been held sufficient to raise the question, all cases holding that a watchman or signals should have been provided being where the crossing was obstructed by structures, curves, or peculiar conditions.

CIVIL ACTION, before *MacRae, Special Judge,* at May Term, 1930, of ALAMANCE.

On 12 March, 1929, the plaintiff, a citizen and resident of Burlington, North Carolina, was taking his wife to school where she was employed as substitute teacher, and was traveling in a Ford roadster. He entered Hoke Street and traveled along said street in the direction of the school. The tracks of the defendant crossed Hoke Street at grade. The tracks run east and west and Hoke Street runs north and south. Park Avenue parallels the railroad track, and thus runs east and west on the south side of the track. The curb of Park Avenue is 40 or 50 feet from the south rail of the main track. Hoke Street is a paved street and the pavement extends across the railroad tracks into what is known as Fisher Street. All of the witnesses testified that Hoke Street was a "nice street."

The side curtains were up and the plaintiff approached the crossing at about 8:15 or 8:26 in the morning. The plaintiff testified that as he moved toward the crossing there were one or two cars ahead of him going in the same direction. One car stopped like it was going to turn in. The other car proceeded across the track. The car crossing the track "was about 15 or 20 feet in front of me. . . . This car I was following kept on across the track. I saw this car parked there to my right. I did not stop there. I did not see a car stopped on the other side of the railroad tracks to my left. There was one car that came across. There were several cars crossing coming towards me, and as this car came on across the track the one in front came on across and kinder knocked the view off from me. . . . There were several cars coming across." Plaintiff further testified at the time he got even with the car parked near the crossing that "a child stepped out like it was going to cross in front of me, and I kinder slowed down, and when I looked up the front of the car was just on the front of the track and I saw the train almost at once, and I cut the car sharp to the right. . . . When I looked up the train was right there on me and the front end of the car was just up on the track."

Plaintiff's wife, who was a passenger in the car, testified: "I am familiar with this crossing. My husband was going with me on this morning. We were traveling in a Ford. I would say we approached this crossing between eight and ten miles an hour. No bell was ringing or signal blown by the engine. . . . When this other car came across the railroad it obstructed his view and he could not see up the track. Just as he got on the track he saw the train, and it was right on us, and he attempted to turn the steering wheel to the right, and when he did that it caught in the cross-ties of the track and he could not get it out any further, and when he did that just as he turned to the right I immediately jumped out of the car. . . . As we approached this crossing Mr. Coulter's car was ahead of our car. Mrs. Thompson's car was ahead of Mr. Coulter's car. When Mrs. Thompson got to the crossing it looked as if she was going to turn around. When she stopped she was very close to the curb. . . . She was driving a Hudson. When she stopped Mr. Coulter's car passed her car and went right across the track. We were close on behind. Mr. Coulter's car barely did get across the track. . . . There was no obstruction of any kind between Park Avenue and the railroad track. The railroad track comes right down the middle of Park Avenue. Park Avenue is a hard surface street. . . . I would say Park Avenue is a regulation width street as compared with other streets. . . . There were cars coming meeting our car at the crossing on the other side of the track. I know one particular car obstructed our view because cars were parked and we could not see. There was only one car that I actually remember meeting. . . . There were other cars on the other side. They were stopped. They were stopped there waiting for the train to pass. . . . When I first approached Park Avenue I did not see the train and did not hear it. I looked some more before our car was on the track. I told you this car that came across obstructed my view. . . . We had the curtains up that morning."

Mr. Coulter, who was carrying his children to school just ahead of plaintiff's car, testified that he did not hear any bell or signal. He further testified that he saw the train and that it was about 150 feet away as he undertook to cross the track.

The evidence discloses that the Hoke Street crossing was a populous and much used crossing, especially by school children, and that there was no watchman or signal devices at the crossing. The evidence of plaintiff further discloses that there was a stop sign at the crossing. The evidence of plaintiff further showed that when you "come in line with Park Avenue you can see up the railroad several hundred yards." This distance was estimated at 300 to 400 yards, and there was no evidence to the contrary.

The usual issues were submitted to the jury and answered in favor of plaintiff. The issue of damages was answered in the sum of $8,000.

From judgment upon the verdict the defendant appealed.

H. J. Rhodes and Frazier & Frazier for plaintiff.
Hines, Kelly & Boren and J. Dolph Long for defendant.

BROGDEN, J. The case presents this situation: Hoke Street in the city of Burlington is an improved and paved street. The tracks of defendant crossed this street at grade. Park Avenue, a paved and improved street, is on the south side of the tracks. The plaintiff approached this crossing, without stopping, although he looked and listened and neither heard nor saw a train. The side curtains were up. When he came in line with Park Avenue, a distance of 40 or 50 feet from the track, he had a clear sweep of unobstructed vision for at least 300 to 400 yards, except for the fact that a car crossing the tracks at the time interfered with the view. At the instant his car ran upon the track a fast passenger train, exceeding the speed limit, was upon him. He turned sharply to the right, and the wheels of his car were caught between the main rail and the guard rail, and he was seriously and permanently injured.

There are two lines of decisions involving crossing accidents that run through the body of our law, as clearly marked and defined as the Gulf Stream that runs through the midst of the ocean. The first line is represented, among others, by the following decisions: *Edwards v. R. R.,* 129 N. C., 78; *Shepard v. R. R.,* 166 N. C., 539; *Perry v. R. R.,* 180 N. C., 290; *Williams v. R. R.,* 187 N. C., 348; *Franklin v. R. R.,* 192 N. C., 717; *Moseley v. R. R.,* 197 N. C., 628; *Scoggins v. R. R.,* 199 N. C., 631; *Thurston v. R. R.,* 199 N. C., 496; *Butner v. R. R.,* 199 N. C., 695. The second line is represented, among others, by the following decisions, to wit: *Rigler v. R. R.,* 94 N. C., 604; *Coleman v. R. R.,* 153 N. C., 322; *Davidson v. R. R.,* 171 N. C., 634; *Holton v. R. R.,* 188 N. C., 277; *Elder v. R. R.,* 194 N. C., 617; *Harrison v. R. R.,* 194 N. C., 656; *Pope v. R. R.,* 195 N. C., 67; *Batchelor v. R. R.,* 196 N. C., 84; *Herman v. R. R.,* 197 N. C., 718.

The paramount question of law is whether the case at bar is governed by the principles announced in the first line or second line aforesaid. Perhaps a book of imposing dimensions could be written upon the various phases of law discussed and applied in the decisions, but upon a consideration of the entire record, we are of the opinion, and so hold, that the case is governed by the principles applied in the second line. Therefore, the plaintiff is not entitled to recover, and the motion for nonsuit should have been granted.

The plaintiff, however, in order to avoid classification in the second line above mentioned, asserts and contends that there are two elements of negligence on the part of defendant in addition to failure to ring the bell or sound the whistle, which would warrant recovery. The first element is that no watchman was maintained at the Hoke Street crossing and no signaling devices of any sort to give notice of the approach of the train. It is well settled that a failure to provide a watchman or signaling devices at railroad crossings may in proper cases be considered by a jury upon the question of negligence of the railroad company in personal injury suits for crossing accidents. However, the fact that a crossing was much used and populous, standing alone, has not yet been deemed sufficient by this Court to raise the question. The authorities upon the subject are assembled in *Batchelor v. R. R.,* 196 N. C., 84. In all cases in which the doctrine has been applied there have been elements of obstructed vision resulting from structures, curves or embankments or other conditions of peculiar danger interfering with the view of a traveler undertaking to cross the track. The second element of negligence insisted upon by the plaintiff is that a car crossing the track at the time he arrived obstructed his view. Such obstruction, however, was not due to any fault of the railroad company, and, indeed, was a circumstance wholly beyond its control. This element was discussed in *Lee v.*

R. R., 180 N. C., at page 413. The plaintiff contended in that case that his vision was obstructed by smoke. The Court said: "If the plaintiff had a bandage across his eyes, the law would not permit him to walk on a track, where he might reasonably expect a train without removing it, and the smoke was as effective as a bandage would be in obscuring or blotting out the vision for the time and almost as easily and speedily gotten rid of."

There is a contention that there is a space of three and a half inches between the guard rail and the main rail, and that this rendered the crossing dangerous and constituted an element of negligence by reason of the fact that the wheels of plaintiff's car caught in this space. There was evidence tending to show that the flange on a car wheel is about one and a half inches. However, there is no evidence that a space of three and a half inches between the main rail and the guard of the track constituted negligent construction.

In the final analysis the facts present the typical case of a traveler approaching a grade crossing in the day time and with an unobstructed vision for three or four hundred yards, who proceeds without stopping fifty feet or more through such area of unobstructed vision and comes upon a track at an instant when a fast passenger train is dangerously near and almost upon him. The evidence discloses that Mr. Coulter crossed the track when the train was 150 feet away. The plaintiff was fifteen to twenty feet behind Mr. Coulter. Manifestly, he took a chance and lost. Under the circumstances, it is the judgment of the Court that he is not entitled to recover.

Reversed.

T. W. MEWBORN, TRADING AS T. W. MEWBORN & COMPANY, v. A. E. SMITH AND METTIE F. SMITH.

(Filed 1 April, 1931.)

1. **Fraud C d—Where fraud is relied on as defense it must be proven by preponderance of the evidence.**

   Where the maker of a note admits her signature thereto and resists payment thereof on the ground of fraud in the procurement of her signature, she is required to establish the alleged fraud by the preponderance of the evidence.

2. **Trial G a—Where court has refused motions for directed verdict he may not grant motion to set aside for insufficient evidence as matter of right.**

   Where during the trial the judge refuses at the close of plaintiff's evidence his motion for a directed verdict in his favor, and again does so at the close of all the evidence, he may not after verdict in defendant's favor grant plaintiff's motion as a matter of right to set aside the verdict, the case being analogous to the statutory right given a party to move for judgment as of nonsuit, it appearing that the trial judge did not set aside the verdict as a matter within his discretion.

APPEAL by defendant, Mettie F. Smith, from *Midyette, J.,* and a jury, at February Term, 1930, of LENOIR. Error.

This is an action brought by plaintiff against defendants to recover the sum of $754.76 and interest on same from 29 March, 1921, due on note (bond) under seal secured by mortgage.

The defendant A. E. Smith made no defense. The defendant Mettie F. Smith set up the plea that the execution of the bond and mortgage were procured by fraud on her. This was denied by plaintiff. The case was first heard in the municipal and county court, and it was adjudged by the proceeding in that court that the signature of Mettie F. Smith was not procured by fraud. She appealed to the Superior Court. The issue submitted to the jury in the Superior Court and their answer thereto, were as follows:

"Was the execution of the note by Mettie F. Smith procured by false and fraudulent representation, as alleged in the answer? Answer: Yes."

Upon the coming in of the verdict, the plaintiff moved the court to set same aside as a matter of right; motion allowed and defendant, Mettie F. Smith, excepted. Defendant, Mettie F. Smith, made motion for judgment on the verdict; motion denied; defendant, Mettie F. Smith, excepted. Judgment signed as appears in the record and from the judgment Mettie F. Smith excepted. Appeal was duly made to the Supreme Court assigning errors on the exceptions above set forth.

Rouse & Rouse for plaintiff.
Shaw & Jones for defendant.

CLARKSON, J. The defendant, Mettie F. Smith, having admitted the execution of the note (bond) under seal and mortgage, was required to produce evidence upon her allegation of fraud.

In *Montgomery v. Lewis,* 187 N. C., at p. 577, we find: "But when the relief demanded was that the deed should be declared void because it was procured by fraud or undue influence or because it was executed with intent to hinder, delay or defeat creditors, the decisions have held uniformly that a preponderance of evidence was sufficient to establish the material allegations."

The record discloses that at the close of defendant's evidence, plaintiff moved for directed verdict in favor of plaintiff; denied; plaintiff excepted. At the close of all the evidence plaintiff renewed motion for directed verdict; motion denied; plaintiff excepted.

The court below denied these motions of plaintiff and the jury, on sufficient evidence, rendered a verdict in favor of defendant. There are no valid reasons in the findings of the court below for setting aside the verdict. The reasons assigned are insufficient in law.

In *Godfrey v. Coach Co., ante,* at p. 42, it is said: "At the close of plaintiff's evidence the defendant demurred and moved for judgment as of nonsuit and renewed its motion at the conclusion of all the evidence. Each motion was denied and in each instance the defendant excepted. By refusing to dismiss the action the trial court adjudged that the evidence was of such probative character as to require the jury's answer to appropriate issues. Having in this way twice adjudged the sufficiency of the evidence, should not the court have regarded its judgment on this point conclusive? It should be noted that as now enforced the right to demur to the evidence in a cause is conferred by statute. The immediate question, which relates to the scope of the statute and the function of the trial court, was considered and determined in *Riley v. Stone,* 169 N. C., 421. On page 424, it is said: 'The motion to dismiss because there is not sufficient evidence to submit the case to the jury when made under the former practice cut off the further introduction of evidence. The statute extended the time for a renewal of the motion to the close of all the evidence. The judge had no power to extend it by amending the statute so as to permit the motion to be made a third time under the guise of "renewed the motion" after verdict. His decision, twice made, that there was evidence to go to the jury, was final upon that point, subject to exception made and entered at the time.' " *Vaughan v. Davenport,* 159 N. C., 369; *Lee v. Penland, ante,* 340.

In *Nowell v. Basnight,* 185 N. C., at p. 147, we find: "The following may be considered as fairly interpretative of C. S., 567: 'Change of practice. This section changes the practice in demurrers to the evidence: *Riley v. Stone,* 169 N. C., 421; *Prevatt v. Harrelson,* 132 N. C., 252; *Means v. R. R.,* 126 N. C., 424. Under the act of 1897, prior to act of 1899: *Parlier v. R. R.,* 129 N. C., 262; *Purnell v. R. R.,* 122 N. C., 832; *Worth v. Ferguson,* 122 N. C., 381; *Wood v. Bartholomew,* 122 N. C., 177. It does not apply to a defense, *Lester v. Harward,* 173 N. C., 83, but may apply to a counterclaim, *Tarault v. Seip,* 158 N. C., 363. Held not to apply to criminal action, *S. v. Hagan,* 131 N. C., 803; but may now, under section 4643. Time of making motion. It must be made first at the close of plaintiff's evidence, and before defendant introduces any evidence: *Smith v. Pritchard,* 173 N. C., 720; *McKellar v. McKay,* 156 N. C., 283; *Boddie v. Bond,* 154 N. C., 359. It is not allowed after verdict, *Vaughan v. Davenport,* 159 N. C., 369; nor after verdict set aside, *Riley v. Stone,* 169 N. C., 421; nor after judgment by default and inquiry, *Mason v. Stephens,* 168 N. C., 370.' "

In *Price v. Insurance Co., ante,* at p. 428, it is said: "In the interpretation of the statute this Court has held that the trial judge has no power to grant the defendant's motion to dismiss the action for insufficient evidence as a matter of law after the verdict has been returned. *Godfrey v. Coach Co., ante,* 41. 'The judge has no power to extend the time by amending the statute so as to permit the motion to be made . . . after verdict.' *Riley v. Stone,* 169 N. C., 421. After verdict he is remitted, on this point, to the exercise of his discretion. *Lee v. Penland, ante,* 340. While a motion to dismiss for insufficient evidence must be disposed of before a verdict in the way the statute prescribes, a motion to set aside a verdict or judgment may be entertained for other errors of law committed during the trial, such, for example, as error in the admission or rejection of evidence or in the charge of the court to the jury."

Upon the record in this action and by analogy to the above authorities, the court below was remitted to its discretion, apparently this has not been exercised.

Error.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK v. T. A. GREEN ET AL.

(Filed 1 April, 1931.)

1. **Appeal and Error E h—Where there is no statement of case on appeal the Supreme Court is limited to correctness of judgment excepted to.**

   Where the record contains no statement of case on appeal the Supreme Court is limited to the consideration of the judgment, the appeal being an exception thereto.

2. **Process B b—Personal service on nonresident held not to be void for failure of affidavit as to residence of defendant.**

   Where the summons in an action has been returned by the proper process officer "defendant not to be found," etc., and thereon and from the verified pleadings of a party the location of the defendant is determined and personal service has been made, an exception to the validity of the service on the ground that the place of residence of defendant in another State was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of the statute having been substantially complied with, C. S., 491, a different rule applying to C. S., 484, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time.

3. Appeal and Error B c—Where party whose interests are sought to be reviewed has not appealed, the question will not be considered.

Where a nonresident defendant has been personally served with summons under the provisions of C. S., 491, and afterwards assigned all his rights and interests in the action, he is not a real party in interest in an appeal taken by his assignee in his name, and where the latter has taken no appeal his rights will not be determined therein.

CLARKSON, J., concurs in result.

APPEAL by T. A. Green from *Johnson, Special Judge,* at July Term, 1930, of NEW HANOVER.

Special proceeding under C. S., 2593, to determine ownership of surplus funds paid into office clerk Superior Court by trustee in foreclosure of deed of trust on real estate situate in New Hanover County.

Several years ago T. A. Green, a nonresident of the State, was the owner of a hotel in the city of Wilmington, which was encumbered by mortgage or deed of trust and other liens. Foreclosure was had under the first deed of trust, and a surplus of $3,035.39 paid into office clerk Superior Court by the trustee for distribution according to law. C. S., 2592. The plaintiff claims a lien on the surplus funds in the hands of the clerk, while the corporate and partnership defendants are unsecured creditors of the said T. A. Green.

The petition was filed herein and summons issued 31 January, 1930, which was duly served on all the defendants, except T. A. Green, who was not to be found in New Hanover County. In apt time verified answers were filed by the corporate and partnership defendants, and in the answer of the North-Smith Coal Company, filed 10 February, 1930, it was set forth that the said T. A. Green was not a resident of this State, but was a resident either of the State of Florida or of the State of South Carolina.

On 19 February, 1930, alias summons (though bearing date of the original) was issued by the clerk of the Superior Court of New Hanover County, accompanied by copy of the petition, to the sheriff of Spartanburg County, South Carolina, which was personally served on the defendant, T. A. Green, 11 March, 1930, and return made in form as provided by C. S., 491. No order for service of summons and petition by publication or personally in another State, was entered by the clerk prior to sending papers to the sheriff of Spartanburg County, South Carolina, nor was there any affidavit, other than answer of North-Smith Coal Company, before the clerk, setting out the defendant's place of residence.

Judgment by default was taken against the defendant, T. A. Green, for want of an answer, 30 June, 1930, as appears by the record.

Thereafter, on 12 July, 1930, the First National Bank of Spartanburg, S. C., entered a special appearance and moved to set aside the default judgment, entered against the defendant, T. A. Green, alleging that on 23 April, 1930, the said T. A. Green, for a recited sum of "one dollar and other valuable consideration," executed to the said bank an assignment of all his right, title and interest in and to the funds involved in this proceeding. This assignment was, on 8 May, 1930, registered in the office of the register of deeds of New Hanover County, and in it the said T. A. Green recites and declares himself to be a resident of the State of Florida.

On 16 July, 1930, the defendant, T. A. Green, entered a special appearance and moved to "quash the service of process in this case because not authorized by the laws of North Carolina."

The motions of T. A. Green and the First National Bank of Spartanburg were denied by the clerk, and this ruling was affirmed by the judge of the Superior Court.

The defendant, T. A. Green, appeals, assigning error.

Ruark & Ruark for plaintiff.

Herbert McClammy and Rountree & Rountree for defendant, T. A. Green.

I. C. Wright for defendant, North-Smith Coal Company.

STACY, C. J., after stating the case: The record contains no statement of case on appeal, hence we are limited to a consideration of the judgment, the appeal itself being an exception thereto. *Parker Co. v. Bank, ante,* 441.

The appellant rests his case upon the ground that the requirements of the statute, C. S., 491, providing for personal service on nonresidents in lieu of publication, have not been observed, in that, it is alleged, the place of residence of the nonresident defendant was not made to appear to the clerk by affidavit prior to his mailing copy of summons and petition to the sheriff of Spartanburg County, South Carolina, for service. But the clerk did have before him, at the time of issuing alias summons, not only the sheriff's return that the said T. A. Green was not to be found in New Hanover County, but also the verified answer of the North-Smith Coal Company to the effect that he was a nonresident of the State, and the summons issued to Spartanburg County, South Carolina, was personally served upon the defendant and due return made thereon.

Under circumstances quite similar to those disclosed by the present record, it was held in the case of *Vick v. Flournoy,* 147 N. C., 209, 60 S. E., 978, that the failure of the clerk to attach his seal to the papers before sending them into a distant State, while a requirement of the statute, C. S., 476, was not of the substance, and that the omission might be supplied later. So here, the irregularity, if such it be, is not regarded as fatally defective, but may, in the discretion of the court, be supplied *nunc pro tunc*. To hold otherwise, we apprehend, would be to exalt the form over the substance. The nonresident defendant was fully apprised, not only of the time and place he was required to appear, but also of the nature and purpose of the action. The power of amendment or to cure a procedural defect, such as the one here suggested, is expressly recognized by a number of decisions. *Jenette v. Hovey,* 182 N. C., 30, 108 S. E., 301; *Mills v. Hansel,* 168 N. C., 651, 85 S. E., 17; *Sheldon v. Kivett,* 110 N. C., 408, 14 S. E., 970; *Branch v. Frank,* 81 N. C., 180.

Service by publication as authorized by C. S., 484, is quite different from personal service on a nonresident under C. S., 491, and so the requirements of the two are different. *Ratio legis est anima legis; mutata legis ratione, mutatur et lex.* Foundation for service under the former statute must be laid in strict compliance with its provisions, for the very good reason that when personal service is not had actual knowledge of the proceeding may come too late to avail the party whose property is sought to be taken. *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Spiers v. Halstead,* 71 N. C., 209. Whereas, under the latter statute, the nonresident is personally notified of the proceeding against his property.

Furthermore, it would seem that T. A. Green, the only appealing defendant, "sawed the limb off between himself and the tree," to quote the language of *Clark, C. J.,* in *Vaughan v. Davenport,* 157 N. C., 156, 72 S. E., 842; *S. c.,* 159 N. C., 369, 74 S. E., 967, so far as his right to litigate the matter is concerned, when he assigned all his right, title and interest in and to the funds in question to the First National Bank of Spartanburg. This was done after he was served with process and before he entered special appearance and moved to quash. It is provided by C. S., 446, that "Every action must be prosecuted in the name of the real party in interest," etc. *Chapman v. McLawhorn,* 150 N. C., 166, 63 S. E., 721.

Again, no notice of appeal was served on the North-Smith Coal Company, or the other defendants, and motion to affirm the judgment as to them must be allowed. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713.

Affirmed.

Clarkson, J., concurs in result.

STATE v. WALTER HICKS.

(Filed 1 April, 1931.)

1. **Criminal Law G r—Where witness has testified that he knew general reputation of another witness his testimony thereon is competent.**

A character witness must be first qualified by an affirmative answer to the question as to whether he knows the general reputation of the witness concerning whose character he is called upon to testify, and then he may of his own volition and without suggestion from the counsel offering him, amplify his testimony by saying his character was good for certain virtues or bad for certain vices.

2. **Criminal Law L e—Defendant in this case held entitled to new trial for prejudicial error.**

The weight and credibility of conflicting evidence is for the jury, and where in a criminal action the exclusion of certain testimony of a character witness is error and prejudicial to the defendant, the Supreme Court on appeal will not say that its exclusion was harmless for the reason that the evidence of defendant's guilt was overwhelming, and the appealing defendant is entitled to a new trial.

CLARKSON, J., dissents.

APPEAL by defendant from *Harwood, Special Judge,* at January Term, 1931, of PERSON.

Criminal prosecution tried upon an indictment charging the defendant with violations of the prohibition laws, as follows:

1. Manufacturing intoxicating liquor; also aiding and abetting in its manufacture. C. S., 3367 and 3411(b).

2. Possessing property designed for the manufacture of liquor and intended for use in its unlawful manufacture. C. S., 3411(d); *S. v. Jaynes,* 198 N. C., 728, 153 S. E., 410.

3. Having and keeping in possession spirituous or vinous liquors for the purpose of sale. C. S., 3379 and 3411(b).

The record discloses that on 9 September, 1930, officers of Person County discovered three colored men, identified as the defendant, Roy Pearson and Clarence Williams, at a distillery, all participating in its operation. Roy Pearson was arrested on the spot, while the defendant and Clarence Williams made their escape.

Roy Pearson testified that the defendant and Clarence Williams were with him at the time of his arrest and that he was employed by them to help run the still. He further testified that he made a crop of tobacco with the defendant during the year 1930, but left before it was cured.

The defendant testified that he was at his home in Harnett County on 9 September, 1930, pulling fodder, and his alibi was supported by a number of witnesses. He denied having anything to do with the distillery in question, and said that Roy Pearson farmed with him during the year 1930, but left his crop, and he had to finish curing his tobacco.

The defendant then offered S. M. Powell and Amos Mims as character witnesses.

S. M. Powell testified: "I know Roy Pearson. Q. Do you know his general reputation? A. I have seen him passing through and have heard of him and Herbert Spencer stealing chickens and making liquor all summer." Motion by solicitor to strike out answer; motion allowed; defendant excepts.

Amos Mims testified: "I have heard some people discuss the character of Roy Pearson. Q. If they discussed his character, did they say what it was, good or bad? (State objects; objection sustained.) Q. Do you know what people in that community who discussed his character say about it? A. Yes. Q. Well, what is it?" State objects; objection sustained; defendant excepts. Witness would have testified that Roy Pearson's character was bad.

Verdict: Guilty in manner and form as charged in bill of indictment.

Judgment: Sixteen months on the roads, not to wear stripes.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Wm. B. Oliver and Thos. W. Ruffin for defendant.

STACY, C. J., after stating the case: Conceding that the action of the trial court in excluding the testimony of S. M. Powell is sustainable on the ground that the witness had failed to qualify himself by first saying that he knew the general reputation and character of Roy Pearson *(S. v. Mills,* 184 N. C., 694, 114 S. E., 314), though this may be doubted on a liberal interpretation of the record *(S. v. Fleming,* 194 N. C., 42, 138 S. E., 342), still it would seem that a new trial must be awarded for error in the exclusion of the testimony of Amos Mims. It would be "sticking in the bark" to say that he did not qualify himself as an impeaching character witness. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793.

The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is. This he may do categorically, *i. e.,* simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices. *S. v. Colson,* 193 N. C., 236, 136 S. E., 730; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468. These requirements were met by the witness Mims, if not by the witness Powell.

But it is urged the defendant's guilt is so overwhelmingly established by the record, that an inadvertence in excluding the testimony of a character witness ought not to be regarded as capitally important. There are two answers to this position. In the first place, it is not conceded that the guilt of the defendant is conclusively established by the record. The witnesses for the defendant, offered to prove his alibi, outnumber those of the State, though it is conceded that the question of numerical weight or balance of witnesses is neither determinative nor significant. Suffice it to say, the evidence is in conflict. In the second place, the credibility of witnesses is peculiarly a matter for the jury and not for the court. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The error is just one of those mishaps which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547. But the defendant has appealed, and he is entitled to a ruling on his exception. *S. v. Setzer,* 198 N. C., 663, 153 S. E., 118.

New trial.

CLARKSON, J., dissents.

HUNT MANUFACTURING COMPANY v. JOHN W. HUDSON, JR., AND THE NATIONAL SURETY COMPANY.

(Filed 1 April, 1931.)

1. **Principal and Surety B b—Where surety takes over construction and purchases directly from materialmen C. S., 2445, does not apply.**

A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit changes its liability as a surety on the bond, and C. S., 2445, providing that a creditor's bill should be the remedy of material furnishers, etc., and that the action shall be brought in the county where the buildings were erected is not applicable.

2. Same—In this case held: C. S., 2445, requiring action on surety bond to be brought in county of construction, is not applicable.

While the board of trustees of the East Carolina Teacher's College is made a body corporate, it is not a municipal corporation within the meaning of C. S., 2445, requiring that an action against the surety on the contractor's bond for public construction be brought in the county in which the buildings were erected.

APPEAL by defendant, National Surety Company, from *Stack, J.*, at October Term, 1930, of GRANVILLE.

Civil action to recover for materials furnished by plaintiff and used by the defendants in the construction of a number of school buildings.

Plaintiff, a corporation with its principal place of business at Oxford, N. C., brings this action in Granville County, and alleges that in 1929, John W. Hudson, Jr., a resident of Edgecombe County, held two building contracts, one with the "Board of Directors of the East Carolina Training School" for the erection of a building on the premises of said school in Pitt County, N. C., and the other with the school authorities of Worcester County, Maryland, for the erection of a number of buildings at different places in said county; and that the National Surety Company became surety on the bonds given to guarantee the faithful performance of both contracts, including payment for labor, materials, etc.; that plaintiff furnished materials to the contractor for use under both contracts, and has not been paid therefor; that the National Surety Company, upon default of the contractor early in 1930, took over the work on both jobs, in order to minimize its loss, and continued to order materials from the plaintiff, agreeing specifically to pay for all materials already furnished and thereafter to be furnished by the plaintiff for use in completing said contracts.

The National Surety Company entered a special appearance and moved to dismiss the action for that under C. S., 2445, suit on defendant's bond is required to be brought in the county where the building is located.

From a judgment overruling the motion, the National Surety Company appeals.

Parham & Lassiter and Hancock & Taylor for plaintiff.
S. Brown Shepherd for defendants.

STACY, C. J. The National Surety Company takes the position that only one action, in the nature of a creditor's bill, can be brought to enforce the surety's liability on a contractor's bond, given to a municipal corporation in connection with public work under C. S., 2445, as amended, and that such action, as provided therein, must "be brought in the county in which the building, road, or street is located, and not elsewhere." This is true, but the provisions of this statute would seem to be inapplicable to the present case.

In the first place, the plaintiff's cause of action is not limited to recovery on the contractor's bond. Another and independent agreement is set out and declared upon. In the second place, C. S., 2445, applies only to bonds given to municipal corporations, and while "The Board of Trustees of the East Carolina Teachers' College" is declared a body corporate by 3 C. S., 5863, such board, we apprehend, is not a municipal corporation within the purview of C. S., 2445. A similar holding was made with respect to the North Carolina State Highway Commission in *Trust Co. v. Highway Commission,* 190 N. C., 680, 130 S. E., 547.

The motion to dismiss the action was properly overruled.

Affirmed.

R. A. HAMILTON v. SOUTHERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 April, 1931.)

1. **Trial D a—On motion to nonsuit all evidence is to be considered in light most favorable to plaintiff.**

   A motion by defendant to nonsuit the plaintiff under the evidence is equivalent to a demurrer to the evidence, and will not be sustained if the evidence liberally construed, and viewed in the light and with inferences therefrom favorable to the plaintiff, is sufficient to sustain his cause of action.

2. **Evidence D i—Testimony as to acts of one joint tort-feasor is competent against the other.**

   In an action to recover damages against joint *tort-feasors* for an injury alleged to have resulted from the acts of each forming a connected continuous sequence proximately resulting in the injury in suit, evidence as to the acts of each are competent against the other.

3. **Master and Servant E a—Federal Employers' Liability Act held applicable to this action.**

   In an action against two railroad companies who together employed a mechanic to repair "bad order cars" on a connection track used and maintained by them both jointly, when the employee is injured while at work on a car in interstate commerce, the Federal Employers' Liability Act applies and the Federal decisions thereunder and the applicable principles of the common law as declared by the Federal courts control in an action brought in the State Court under the provisions of the act.

4. **Torts B a—In action against joint tort-feasors admission in evidence of contract governing use of joint property held not error.**

Where two railroad companies employ a mechanic to repair "bad order cars" on a connecting track maintained by them jointly under a contract fixing a joint liability for negligent injuries to employees working thereon and paid by them both, and both are sued as joint *tort-feasors* for an injury to an employee while repairing a car thereon, the admission in evidence of the contract is at least harmless with other evidence tending to show that the injury was the result of their joint negligence as proximate causes of the injury in suit.

5. **Master and Servant E b—Evidence that defendants were liable under the act as joint tort-feasors held sufficient.**

Where two railroad companies operate a connecting track between their respective tracks which is used for repairing "bad order cars," and both employ or pay a mechanic to repair "bad order cars" thereon, and under an agreement between them a "bad order car" is placed upon the track for temporary repair by one railroad company which negligently notifies the other that the car was ready to be moved, and an employee of both is injured while making the necessary repair by the negligence of the latter company in moving the car without taking proper precautions: *Held*, the evidence that the injury was proximately caused by the concurrent and continuing negligence of both under the provisions of the Federal Employers' Liability Act as amended is sufficient, and a recovery for the resultant injury may be had against both as joint *tort-feasors.*

6. **Same—Evidence of defendant's negligence held sufficient to take the case to the jury under the provisions of the Employers' Liability Act.**

Evidence tending to show that an employee of a railroad company while repairing a brake on a "bad order car" in the course of his employment in interstate commerce, was injured by the defendant's train suddenly and without warning and with unusual force coupling the car without making the customary inspection to see that the car was ready to be moved, is held sufficient to take the case to the jury upon the issue of the defendant's actionable negligence under the provisions of the Federal Employers' Liability Act, as amended.

7. **Master and Servant E a—The Federal Employers' Liability Act is to be liberally construed to effectuate its remedial purpose.**

The Federal Employers' Liability Act is a humane and remedial statute, and to effectuate its purposes the courts will liberally construe it, and evidence of liability thereunder may be either direct or circumstantial.

8. **Master and Servant E b—In this case held: evidence of contributory negligence was for the determination of the jury.**

Where there is evidence that repair work on cars was done on the defendant's tracks in a certain locality without placing blue flags to show that such work was being done, the failure of a repairman to place such flags on the track while making repairs will not be held to constitute contributory negligence as a matter of law under the Federal Employers' Liability Act, the issues of contributory negligence and assumption of risks thereunder being ordinarily for the determination of the jury.

9. **Negligence B d—Act of negligence operating in unbroken sequence and uniting with negligence of another to cause injury is a proximate cause.**

A prior negligent act may be a joint proximate cause of an injury if uniting with a subsequent negligent act of another it operates in a continuous and unbroken sequence to produce the injury in suit.

10. **Negligence A d—It is not necessary to liability that particular injury could have been foreseen if harm could have been anticipated.**

It is not required that a *tort-feasor* should have anticipated the particular injury resulting from his negligent act in order to hold him responsible therefor in damages, but he is responsible for all the consequences of his negligent act which are natural and probable when injury or harm from the act could have been foreseen by a reasonably prudent man under the circumstances.

11. **Master and Servant E b—Employee must establish negligence of employer to recover under Federal Act—Burden of proof.**

Where issues of negligence, contributory negligence and assumption of risks arise upon the trial of an action under the Federal Employers' Liability Act, the burden of proof is upon the plaintiff upon the issue of negligence, and he must establish the defendant's negligence as the proximate cause of his injury, and the burden is on the defendant to prove contributory negligence and assumption of risks when relied on by him.

12. **Trial C a—Refusal of defendant's request for last speech to jury held not error under the facts of this case.**

In an action against joint *tort-feasors* involving the issues of negligence, contributory negligence, and assumption of risks, wherein one only introduces evidence, the other not introducing evidence is not entitled, as a matter of right, to the opening and concluding speech to the jury under the provisions of Rule 3 of our practice, and a refusal of this request by the trial judge will not be held for error.

13. **Evidence K b—Admission of X-ray photograph in evidence for purpose of corroboration held not error.**

Held, under the facts of this case against two joint *tort-feasors* to recover damages for an alleged personal injury negligently inflicted, the admission in evidence of an X-ray photograph for the purpose of corroborating a witness, if error, was not prejudicial.

APPEAL by defendants from *Nunn, J.*, and a jury, at November Term, 1929, of WAKE. No error.

In speaking of the Southern Railway Company, it will be referred to as the "Southern" and the Seaboard Air Line Railway Company, as the "Seaboard."

This is an action in the final analysis for actionable negligence, brought by plaintiff against the defendants as joint *tort-feasors*. The plaintiff contends that there was a track at Franklin, Va., in the shape of a semi-circle, connecting the two defendants' railroads that has parallel lines, known as an "exchange track." The main line of the Southern was on the east side and the Seaboard on the west. That this "exchange track" was used for the purpose of transferring cars from the Southern to the Seaboard track, or from the Seaboard to the Southern track. That on 27 October, 1913, there was a contract entered into in full force at the time of plaintiff's injury, between said defendant railroads. The contract, in part, reads: "(4) The portions of said track a joint interest in which is hereby conveyed aggregating 1,679 feet. . . . That each party hereto shall have equal rights with the other in and to the use of said portions of said track *so to be jointly owned and operated hereunder,* as aforesaid, but shall so use the same as to cause the least practicable interference with, interruption of, danger or delay to, the operating of the other party hereto thereupon." The maintenance is to be paid half by each. Provision is made in the joint contract as to liability for damages: "(7) That the responsibility of the parties hereto, as between themselves, for the defense or payment of any and all claims, demands, suits, judgments or sums of money to any person accruing for loss, injury or damage, however resulting, either to person or estate, and arising by reason of, or in connection with the joint use by the parties hereto of the said tracks, as aforesaid, shall be distributed as follows, that is to say"; etc. "(b) When the proximate cause of any such damage shall be negligence to which employees of both parties hereto shall have contributed, then each party hereto shall bear all loss incident to any injury to, or damage of its own property; but the responsibility for all loss or damage accruing to employees or third persons or corporations, not parties hereto, by reason of such concurrent negligence, shall be borne by the parties hereto in equal contribution."

On 10 December, 1927, and for about six months prior thereto, the plaintiff was in the employ of the Seaboard on this "exchange track" as car inspector and repairman, and also working for the Southern as repairman. The Seaboard paid him, but inferentially the Southern contributed to his pay. Freight that was to be transferred to the Southern would go over the connecting tracks, also freight to be transferred to the Seaboard. Between the two was a State highway grade crossing. Between the Seaboard tracks and the highway was the car inspector's shanty used by plaintiff.

Plaintiff testified, in part: "They used this connection track for other purposes, they put cars in there for the Seaboard to pick up, and they would put cars in there for the Southern to pick up the next day, and for moving cars from the Southern to the Seaboard and back. It was used for repairing brakes. I went to work at Franklin, Va., in July, 1927, and was constantly employed there from that time until I was injured. . . . *We repaired cars there every day on this track;* when a train came in and there was something wrong with the car I would get the car and repair it. I had nothing to do with the placing of cars on the track. I made repairs to those *bad order* cars coming in. I made repairs on that track all the time I was there. Southern trains usually came in on that connection track anywhere between 10:45 and 11:00 o'clock to pick up cars; the passenger train was due at 10:58. On 10 December, 1927, the train came in from the Southern on the connection track between 9:15 and 9:30 in the morning. I had never seen it there as early as that before. It was a switcher out of Portsmouth. . . . Q. During your entire employment there what was the custom and practice with respect to making light repairs to freight cars? (Objection by defendants; overruled. Defendants except.) A. The custom and practice was to repair them at different places wherever it was convenient; around the yard limits where it was convenient, and I repaired some over the river and some on this connection track and in different places. . . . My tools were in the shanty. I had nothing to do with the movement of cars. On the morning of 10 December, 1927, I was applying a brake shoe on a Southern car on the connection track, located just a few steps from the shanty toward the highway, and I think it was east. It was toward the Southern track. That car was placed there about five minutes before I went to repair it. *Before I made repairs to it, it was not in safe condition for movement.* It had a defective brake. . . . I was working on the end of the car in the opposite direction from which the Southern train came. It would be hard to see a train coming from the Southern to the Seaboard because there is a big bank on the inside of the curve. . . . Q. State whether or not you had repaired cars on this connection track for the period of time you had worked prior to 10 December, 1927? A. Yes. Q. What was the custom of the crew of the Southern when they would come in the connection track to get cars from the Seaboard for the Southern? A. It was customary for the trains to come into the connection track and stop before coupling to the cars and for a member of the Southern crew to get down on the ground and look around the car and see if it was ready for the Southern to move it. Q. State whether or not that had been the custom during the entire time you had worked there for the Southern and the Seaboard? (Objection by defendants; overruled. Defendants except.) A. Yes. . . . I was working on the end of the car nearest the shanty, replacing a brake shoe. I was connecting a brake under the car. I was facing the car, I had to put a brake shoe in and that is next to the wheel on the inside, and the *old shoe was worn out,* and to apply the new one I had to disconnect the brake under the car, and I got a new shoe in and stepped back underneath to reconnect the brakes. There is a piece of casting that extends toward the end, and there is a lever piece to the casting, and there are several places where you tighten them. I earned around $145.00 per month at this place. I did not have any notice or warning of any kind that any car or train was coming over that connection track during that hour? I did not ever, at any time, see that train or car come in over that track from the Southern end at that hour of the day. . . . I was performing my services like I had been and making the light running repairs. This was the kind of repair that I was required to make. Replacing parts is a light repair. Performing the service I was performing required me to be in the position that I was in at the time referred to. While I was engaged in the performance of my duties the Southern from the other end came in over this track and hit the car that I was working on and knocked me up under it and dragged me, squeezed me and mashed me at the same time. Q. State whether or not any signal was given of the approach of that train? A. No; I never heard a sound of it. I never heard a sound of any signal. I had no knowledge of the approach of the train until the collision occurred. Wedges under the wheel were holding the car stationary upon which I was working, sufficient to keep it from moving of its own volition. *It was a hard blow, and it* was knocked the length of the car, and I couldn't get out, and give an alarm that I was hurt. It dragged me the distance of the car." The length of the car was between 30 and 40 feet. Plaintiff testified further that blue flags were "not used for making repairs on a transportation yard. . . . I was just broke to pieces and my chest, back and head seemed like it was crushed. The left jaw was broke, and my eyes swollen so that I could not see. I never have closed my teeth on one side since, and they do not come together. . . . I am not able now to close my teeth and chew food as I did before. They did not do anything to the jaw at the hospital. My back and shoulder pain me all the time; when I try to erect myself it hurts. I am deformed and I am very much stooped over. The left shoulder is one or two inches lower than the right one since I was injured. The left shoulder was broken. The bottom of that shoulder is where I am troubled, and it never has been right." Plaintiff made no request for this car to be removed. "I could not lean out to the side and see. I would not see around the bend on account of the curve and the high bank. That is the way I had done it since I had been there. If I needed assistance I could call on the section people. I suppose if I had needed any one that morning to help me I would have called on the section force and I suppose they would have come. I had repaired cars on other tracks. The derailer had been set on the track toward the point from which the Seaboard came in. No train could come in over that unless the derailer and switch were changed. . . . I was making repairs at Franklin in the same manner in which I theretofore made repairs at Raleigh. In this case I did not know that the car was going to be moved by the Southern or any other train. The connection track was the most convenient place in the yard to make these repairs. No assistant was necessary in making that repair. Q. What about the force with which the coupling was made, had you observed that prior to this date? (Objection by defendants; overruled. Defendants except.) A. Yes. Q. How did the manner in which that coupling was made that morning compare with the force ordinarily used? (Objection by defendants; overruled. Defendants except.) A. It seemed to *hit the car much harder*, shoving it up at least a car length. I had not noticed them hitting that hard before. Q. State whether or not there was any necessity of using the force that was used to make it? (Objection by defendants; overruled. Defendants except.) A. No. Q. State whether or not there was any necessity of knocking the car any distance? (Objection by defendants; overruled. Defendants except.) A. As a general rule it moved a few inches, and you can couple a car just moving it a few inches. I was never furnished any rule book by either the Southern or Seaboard. I answered what the name of the book was that Major Joyner showed me, by reading the name printed on the front of it. . . . I did not ever request the Seaboard or Southern to furnish me a blue flag. There had not been any custom or practice that required the use of a blue flag on my part."

Upon demand made upon the defendants by counsel for plaintiff the defendant, Southern, furnished to plaintiff the papers which were admitted by the defendant, Southern, to be *a true copy* of the contract between the Southern and the Seaboard relative to the interchange track and in force and effect on 10 December, 1927. The plaintiff offered this contract in evidence.

Plaintiff offered in evidence a portion of section 5 of the answer of defendant, Seaboard, as follows: "It is admitted that the interchange or connection track at Franklin, Va., is used in the transfer of freight cars between this defendant and the Southern under a private contract entered into by this defendant and said company." (The Southern and Seaboard both objected to the introduction of the contract, overruled, the defendants except.)

Plaintiff offered in evidence a portion of the answer of defendant, Seaboard, to section of the amended complaint, as follows: "It is admitted that on 10 December, 1927, the plaintiff was engaged in making repairs to Southern box car No. 35869 on the track connecting this defendant's line of railroad with that of the Southern."

The defendant, Seaboard, admitted that it was engaged and that plaintiff was employed in interstate commerce at the time of the injury.

R. H. Peters, a witness for defendant, Southern, testified in part: "I am an employee of the Southern. I am operator-clerk at Franklin, Va., and have been there since 1918, and I have been with the railroad for twelve years. On and before 10 December, 1927, it was my duty relative to noting the arrival of Southern trains to put it down on regular forms. I made a record of the arrival of trains of which Mr. Yarborough was the conductor known as the switcher. I have here the record which I made myself that records the arrival of trains at Franklin. The switcher arrived at Franklin at 9:35 on 10 December, 1927. The general arrival of the time of that train varied. It depended upon the volume of business. . . . During the latter part of November the hours of arrival were later, depending upon the amount of business. In connection with the removal of Southern cars from the interchange track it was my duty to receive the numbers from the Seaboard and they notified me that they were on there and I had to give the conductor a list to take them off. I do not know whether it was the custom of the Seaboard to notify me when a car was placed on the track. They would phone us that the cars were ready to be pulled. My records show that on 10 December, 1927, Conductor McGee (of the Seaboard) phoned that Southern empty car number 36859 was ready for movement, and that is all the information that I had at the time concerning the car. That was the regular way of notifying me, either by that or the agent. After I got that information I put it down on the record book and put it on the switch list to come out. I gave the directions to Conductor Yarborough as soon as he got in the office."

J. T. Soloman, a witness for Southern, testified "Am employee of Seaboard. I am clerk for supply department." On cross-examination: "The records do not show that any *blue flag* was sent to Mr. Hamilton."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, Southern, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff by his own negligence contribute to his injury as alleged in defendant Southern's answer? Answer: No.

3. Was the plaintiff engaged in interstate commerce at the time of his injury? Answer: Yes.

4. Was the plaintiff injured by the negligence of the defendant Seaboard, as alleged in the complaint? Answer: Yes.

5. If so, did the plaintiff by his own negligence contribute to his own injury as alleged in the answer of defendant Seaboard? Answer: No.

6. Did the plaintiff voluntarily assume the risks of his injury as alleged in the answer of the defendant Seaboard? Answer: No.

7. What amount of damages, if any, has plaintiff sustained by reason of his injury? Answer: $33,875.00.

8. If the plaintiff by his own negligence contributed to his injury, by what amount are the damages to be reduced? Answer: ...."

Upon the verdict, the court below rendered judgment. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

The other material facts will be considered in the opinion.

Robert N. Simms and Clyde A. Douglass for plaintiff.
Smith & Joyner for Southern.
Murray Allen for Seaboard.

CLARKSON, J. At the conclusion of plaintiff's evidence, the defendant, Southern, moved for judgment as in case of nonsuit. C. S., 567. The court overruled this motion and the defendant, Southern, duly excepted and assigned error.

At the conclusion of plaintiff's evidence, the defendant, Seaboard, moved for judgment as in case of nonsuit. C. S., 567. The court overruled this motion and the defendant, Seaboard, duly excepted and assigned error.

The defendant, Seaboard, then rested without offering testimony and renewed its motion for judgment of nonsuit at the close of all the evidence. The court overruled this motion, and the defendant, Seaboard, duly excepted and assigned error. C. S., 567.

In *Moore v. R. R.*, 179 N. C., at p. 639, we find: "It is the rule prevailing in both State and Federal procedure that on a motion for involuntary nonsuit, equivalent with us to a demurrer to the evidence the facts presented which make in favor of plaintiff's claim, must be accepted as true and interpreted in the light most favorable to him." *Certiorari* denied. *Director General of Railroads v. Moore,* 254 U. S., 640; *Southern Railway Co. v. Gray,* 241 U. S., at p. 337 (167 N. C., 433).

The defendant, Seaboard, then requested the court in writing to instruct the jury that they cannot consider as evidence against defendant, Seaboard, any testimony offered by the defendant Southern, or by plaintiff in rebuttal. The court refused to so instruct the jury and the defendant, Seaboard, excepted and assigned error. C. S., 565.

The defendant, Southern, offered the conductor of its train at the time of the injury, who started to testify. Defendant, Seaboard, at this point moved the court to instruct the jury that none of this evidence was to be considered against the Seaboard. The motion was overruled and the defendant, Seaboard, excepted and assigned error. We think the court was correct in overruling all the above motions and the instructions prayed for by the Seaboard.

The defendant, Seaboard, admitted that it was engaged in and plaintiff was employed in interstate commerce at the time of his injury. It also admitted that on 10 December, 1927, the day plaintiff was injured, he was engaged in making repairs to Southern box car No. 35869, on the track connecting its line of railroad with that of the Southern.

The Supreme Court of the United States declared the First Federal Employers' Liability Act invalid. First Employers' Liability Cases, 207 U. S., 463, 52 L. Ed., 297.

The Second Federal Employers' Act was held valid. 223 U. S., 1, 56 L. Ed., 327. "The first section provides that every common carrier by railroad while engaged in interstate commerce shall be liable to every employee while employed by such carrier in such commerce or in case of his death, to certain beneficiaries therein named, *for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employees, or by defects or insufficiencies due to negligence in any of its equipments or property.* The second section provides that every common carrier by railroad on lands of the United States other than states shall be liable in the same way to any of its employees. *The third section prescribes that contributory negligence shall not bar recovery, but shall only diminish the damages,* except that no employee *injured or killed where the violation of a safety law for employees contributed to the injury, shall be held to have been guilty of contributory negligence.* The fourth section provides that *assumption of risk* shall not be a defense, where the violation of a safety law contributed to the accident. The fifth section declares all contracts or devices intended to exempt the carrier from liability under the act to be void, except that the carrier may plead as a set-off any sum it paid to the injured employee as insurance or relief fund. Section 6 provides that any action under the act is barred after two years. Section 7 declares that the term 'common carrier,' as used in the statute, shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." (Italics ours.) 2 Roberts Federal Liabilities and Carriers (2d ed.) (1929), part sec. 709, p. 1329.

The defects in the act of 1908 were covered by amendments of 1910. "In the enforcement of the provisions of the act of 1908, the courts held that the right of action given to an injured employee did not survive to his personal representative in the event of his death; that an action instituted in the state court under the Federal Act could be removed to the proper circuit court when the required amount was involved and a diversity of citizenship existed, and that when the jurisdiction of a Federal Circuit Court was based on the fact that the suit arose under a law of the United States, the plaintiff was compelled to sue in the district of which the defendant was an inhabitant, which, in case of a corporation, was the jurisdiction in which the charter of the defendant corporation was issued. . . . The amendatory act of 1910 resulted from the decisions of the courts in these cases. *The amendment to section 6 provided that any action under the act may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action, and further prescribed that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states,* and no case arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. The second amendment provided that any right of action given by the act to a person suffering injury *shall survive to his or her personal representative,* for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." (Italics ours.) Roberts, *supra, sec.* 710, pp. 1336-7. *Lamb v. R. R.,* 179 N. C., 622; *Barbee v. Davis,* 187 N. C., 78, *certiorari* denied, 264 U. S., 588; *Southwell v. R. R.,* 191 N. C., 153, 275 U. S., 64; *Inge v. R. R.,* 192 N. C., 522, *certiorari* denied, 273 U. S., 753; *Troxler v. R. R.,* 194 N. C., 446; *Cole v. R. R.,* 199 N. C., 389; *certiorari* denied, 9 January, 1931; *Pyatt v. R. R.,* 199 N. C., 397.

"The provision of section 2 of the Safety Appliance Act of 1910, requiring all cars of railroads whose lines are highways of interstate commerce to be equipped with 'efficient hand brakes,' unlike the provision respecting power brakes, applies to cars while engaged in switching operations and in train movements as well. The brake must at all times be 'efficient.'" Roberts, *supra,* part sec. 719, p. 1351.

"The Safety Appliance Act, as finally amended and as supplemented by the orders of the Interstate Commerce Commission, requires the furnishing and maintenance of a considerable number of appliances. . . . *Here, also, may be placed the provision permitting a carrier to refuse to receive from connecting carriers or shippers any cars not equipped sufficiently, in accordance with the first section of the act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by the act.*" (Italics ours.) Roberts, *supra,* sec. 716, at p. 1347.

The material part of the Safety Appliance Act applicable to this case provides: "It shall be unlawful for any common carrier subject to the provisions of this act to haul, or *permit to be hauled,* or used, on its line any car subject to the provisions of this act not equipped with . . .

efficient hand brakes. . . ." (Act 14 April, 1910, 36 Stat. at L., 298, chap. 160 and part of sec. 2, 1 July, 1911.)

"The courts are agreed that the Federal Employers' Liability Act, being a humane and remedial statute, should invariably be given a liberal construction, to the end that the remedy proposed shall be advanced, and that the evil against which it was directed shall be corrected." Roberts, *supra,* sec. 711, p. 1337. Section 712: "Moreover, since it is a Federal statute, decisions of the National courts construing the act take precedence over those of the State courts. For example, in determining when a carrier is guilty of negligence under the act; when an employee assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether the doctrine of *res ipsa loquitur* applies; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which decisions of the National courts control. 'As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts.' *(Southern Railway Co. v. Gray,* 241 U. S., 333, 60 Law Ed., 1030 (167 N. C., 433, reversed). Where the decisions of the Federal courts on a question under the act are conflicting, then a State court will follow those decisions of the National courts which appear to it to rest on the better reason." Section 712, pp. 1338-40, Roberts, *supra.*

In *Jamison v. Encarnacion,* 281 U. S., at p. 640, *Mr. Justice Butler,* delivering the opinion of the Court, citing numerous authorities, said: "It is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. . . . The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure. . . . The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. . . . 'Negligence' is a word of broad significance, and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements.

Some courts call wilful misconduct evincing intention or willingness to cause injury to another gross negligence."

In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law, as interpreted and applied in Federal courts; and negligence is essential to recovery. *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S., 367.

"One of the leading cases under the Federal Employers' Liability Act was that of *Seaboard A. L. R. Co. v. Horton,* 233 U. S., at p. 501, reversing this Court (162 N. C., 424). *Mr. Justice Pitney* said: 'It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; *the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Hough v. Texas & P. R. Co.,* 100 U. S., 214; *Washington & G. R. Co. v. McDade,* 135 U. S., 554; *Choctaw, O. & G. R. Co., v. McDade,* 191 U. S., 64, 67.'" (Italics ours.) *Southwell v. R. R.,* 191 N. C., at p. 157-8 (275 U. S., 64).

"The term 'negligence' has been defined by the National Supreme Court to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation. Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. *Charnock v. Texas & R. R. Co.,* 194 U. S., 432, 48 L. Ed., 1057." Roberts, *supra,* sec. 811, pp. 1558-9.

In *Baltimore & O. R. R. Co. v. Groeger,* 266 U. S., at p. 524, we find: "The credibility of witnesses, the weight and probative value of evidence are to be determined by the jury and not by the judge. However, many decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

"It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.' " *Nash v. Royster,* 189 N. C., at p. 410; *Murphy v. Coach Co., ante,* at p. 100.

"Direct or positive proof is not required to show that a negligent act or defect was the cause of an injury to, or death of, an employee engaged in interstate commerce. The manner and circumstances of the occurrence, and all the accompanying surroundings, as proven, may be examined in order to ascertain and determine whether or not an inference that a negligent defect caused the death was a reasonable one." Roberts, *supra,* sec. 819, at p. 1572; *Goss v. Williams,* 196 N. C., 216.

We have set forth at length the law in the Federal courts applicable to this action.

The defendant Seaboard, in its answer, denied negligence, and set up the plea of contributory negligence and assumption of risk. Applying the law as above stated, was the evidence in regard to negligence sufficient to be submitted to a jury? We think so. Plaintiff's evidence was to the effect: That he was working on an "exchange track" as a car repairman for the Seaboard and Southern, on 10 December, 1927, at Franklin, Va., and inferentially both defendants contributed to his pay. The evidence was sufficient to be submitted to a jury that he was in the employ of both defendants. That at the time there was an agreement between the defendant railroads in regard to the "exchange track." The answer of defendant Seaboard admitted that the "exchange track" is used in the transfer of freight cars between it and the Southern under a private contract entered into between them. The Southern on demand of plaintiff produced the contract between them relative to the "exchange track" and that it was in force and effect at the time plaintiff was injured on 10 December, 1927. The defendants are sued as joint *tort-feasors.* There was evidence *aliunde* as to said railroads being joint *tort-feasors.* At least the manner of introduction of the evidence to show this was in the discretion of the court below and there was evidence of coöperation.

In Wigmore on Evidence, Vol. 2 (2 ed.), at latter part of section 1079, at p. 593, we find: "The admissions of joint *tort-feasors* are receivable against another on the same principle and with the same limitation as those of conspirators; this is merely the same doctrine in its application to civil liability for torts."

This contract was to the effect that each of the said railroads have "equal rights with the other in and to the use of" the "exchange track," "so to be jointly owned and operated hereunder." The maintenance to be paid half by each. Then the responsibility between them for "injury" to "person," however resulting and "arising by reason of or in connection with the joint use by the parties hereto of the said tracks as aforesaid, shall be distributed as follows," etc. The responsibility for damages to employees by reason of concurrent negligence "shall be borne" by the parties hereto in equal contribution! We think the evidence sufficient to make the contract competent against both defendants.

Near this "exchange track" was a car inspector's shanty, with tools which were used by plaintiff in repair work continuously for some six months prior to the injury complained of. Cars were put on the said track by both defendants to pick up in the course of business, and it was used for repairing brakes. Plaintiff repaired cars every day on this track. That is when there was anything wrong with the cars, and made repairs on the bad order cars coming in. Plaintiff had nothing to do with the movement of the cars.

The question and answer in regard to the custom and practice in regard to making light repairs to freight cars on the "exchange track" is competent. A peculiar and special custom is not binding on a person, unless known to him. *First Nat. Bank v. Birkhart,* 100 U. S., 686. Long established customs and usages are to be judicially recognized as part of the law. *Dale v. Pattison,* 234 U. S., 399.

The rule is thus stated in *Penland v. Ingle,* 138 N. C., at p. 457: "The character and description of evidence admissible for establishing the custom is the fact of a general usage and practice prevailing in the particular trade or business, and not the opinions of witnesses as to the fairness or reasonableness of it." *Crown Co. v. Jones,* 196 N. C., at p. 211.

On the morning of plaintiff's injury, 10 December, 1927, the Seaboard placed a Southern car on the "exchange track" about five minutes before plaintiff went to repair it. When the *crippled car* was put in the "exchange track" by the Seaboard, the switch on the Seaboard end of the connection track was set for the main line, and there was a derailer on this track and no car could come in, and if it did the derailer would throw it off the track. The Southern car, when put on the connecting track was not in a safe condition for movement. The brake was defective. This car was a few steps from the shanty furnished for plaintiff as repairman. This car was on an incline, wedges under the wheel were placed by plaintiff for holding the car stationary to keep it from moving of its own volition, while he was working under it. Plaintiff was working on the end of the car nearest the shanty, replacing a brake shoe; he was facing the car; he had put a brake shoe in next to the wheel on the inside; the old shoe was worn out. To apply the new one he disconnected the brake under the car, when he got the new shoe in; he stepped back underneath to reconnect the brakes. There was a piece of casting that extended towards the end and there was a lever piece to the casting, and there were several places to tighten them. Plaintiff, while working at the end of the car in the opposite direction from which the Southern Railway train came in, could hardly see a train coming from the Southern main track over this connection track to the Seaboard, as there was a big bank on the inside of the curve. Plaintiff gives his version of the injury as follows: "I did not have any notice or warning of any kind that any car or train was coming over that connection track during that hour. I did not ever, at any time, see that train or car come in over that track from the Southern end at that hour of the day. . . . I was performing my services like I had been and making the light running repairs. This was the kind of repair that I was required to make. Replacing parts is a light repair. Performing the service I was performing required me to be in the position that I was in at the time referred to. While I was engaged in the performance of my duties the Southern from the other end came in over this track and hit the car that I was working on and knocked me under it and dragged me, squeezed me and mashed me at the same time. Q. State whether or not any signal was given of the approach of that train? A. No, I never heard a sound of it. I never heard a sound of any signal. I had no knowledge of the approach of the train until the collision occurred."

Plaintiff, while under the car performing his duty as a repairman for both defendants, as we think the evidence warrants, the car belonged to the Southern, and in removing a worn out brake shoe the defendant Southern without warning or notice, and earlier than was customary, with unnecessary and harder force than ordinarily used, knocked the crippled car at least a car length and seriously injured plaintiff.

"Again, it is recognized in both jurisdictions that railroad companies in the operation of their freight trains are held to a high standard of care reasonably commensurate with the risks and dangers usually attendant upon the work, and although negligence may not be inferred from the ordinary jolts and jars incident to their operation, it may be imputed where there has been a 'sudden, unusual, and unnecessary stopping of such trains, likely to and which do result in serious and substantial injuries to employees or passengers thereon.' *Texas Pacific Ry. v. Behymer,* 189 U. S., 469; *Texas Ry. v. Archibald,* 170 U. S., 665-673; *Indianapolis, etc., Ry. v. Horst,* 93 U. S., 291; *Jones v. R. R.,* 176 N. C., 260; *Ridge v. R. R.,* 167 N. C., 510; *Suttle v. R. R.,* 150 N. C., 668; *Marable v. R. R.,* 142 N. C., 557; *Con. N. O. & T. P. Ry. v. Evans, Admr.,* 129 Ky., 152." *Lamb v. R. R.,* 179 N. C., at p. 622.

We think the exception and assignment of error in regard to this line of evidence—sudden, unusual and unnecessary coupling—under the circumstances of this case, cannot be sustained. It was further in evidence on the part of plaintiff that he made no request for this car to be removed, and there was no custom or practice that required the use of a *blue flag* on the part of plaintiff. If the defendants, Seaboard or Southern, knew, or by the exercise of due care ought to have known that this was a *crippled car,* either one of the defendants under the safety appliance act could refuse to receive it until repair was made. The Seaboard knew, or in the exercise of reasonable care ought to have known, this Southern car was crippled, and when crippled or needing repair, it was the plaintiff's duty to repair it. The Southern could not haul or permit it to be hauled in its crippled condition. The evidence being to the effect that the Seaboard jointly owned, operated and used the "exchange track" with the Southern, and it was a question of due care, in that the Seaboard did not notify the Southern that it had put one of its crippled cars on the "exchange track" that required repair. At its end it had protected the car by a derailer, knowing plaintiff, in the performance of his duty, had to go under the car to repair the worn out brake, but omitted to notify the Southern of the condition of the car and the duty of plaintiff to repair same and the hazard attendant on plaintiff of the Southern going on this "exchange track" to pick up the car without giving plaintiff warning.

The courts invariably give a liberal construction to the Federal Employers' Liability Act, it being humane and remedial. It is said by *Mr. Justice Butler,* in the *Jamison case, supra:* "While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements."

The evidence in matters of this kind can be either direct or circumstantial. The authorities are to the effect that the essence of the fault may lie in omission or commission. The rule applicable may be thus stated by a general confession prayer of one of our churches: "We have left undone those things which we ought to have done; and we have done those things which we ought not to have done; and there is no health in us."

This omission on the part of the defendant, Seaboard, from the evidence, left no physical health in plaintiff, according to his testimony. As to the spiritual—that is another realm. See *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S., 42; *Chicago R. I. & P. R. v. Wright,* 239 U. S., 548; *Texas & P. R. Co. v. Rigsby,* 241 U. S., 33; *San Antonio & A. P. R. Co. v. Wagner,* 241 U. S., 476; *Spokane & C. R. R. v. Campbell,* 241 U. S., 497.

In *Link v. Seaboard Air Line R. Co.,* Vol. 156 S. E., at p. 483 (S. C.), an able opinion written by *Associate Justice Stabler* of the Supreme

Court, citing numerous Federal decisions: "It is now settled beyond controversy that the Federal Safety Appliance Act imposes upon the carrier an absolute duty to equip its cars with appliances prescribed in the act, and to maintain such appliances in a secure condition; and the liability for failure to do so is absolute, regardless of negligence on the part of the defendant or contributory negligence on the part of the plaintiff."

The primary cause may be the proximate cause of a disaster though it may operate through successive instruments. *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S., 469.

Mr. Chief Justice Waite in delivering the opinion of the Supreme Court of the United States in *Grand Trunk Railway Company v. Cummings,* 106 U. S., 700, 27 Law Ed., at p. 267, said: "If the negligence of the company *contributed to,* it must necessarily have been an *immediate cause* of the accident."

The rule is that a man is bound to contemplate the natural and probable consequences of his own act. *Lazarus v. Phelps,* 152 U. S., 81.

One is held responsible for all the consequences of his acts which are natural and probable and ought to have been foreseen by a reasonably prudent man. *Atchison T. & S. F. R. Co. v. Calhoun,* 213 U. S., 1.

To relieve the one responsible for the original wrong from liability for injury there must be the intervening of a new and independent cause between the wrong and the injury. *Texas & P. R. Co. v. Stewart,* 228 U. S., 357.

In Roberts, *supra,* sec. 872, at p. 1701, we find: "The Employers' Liability Act, however, differs from the other Federal acts regulating railroads in that it states, with some particularity, the basis of civil liability of carriers for injuries to their employees. The terms of the act must be examined to ascertain whether it changes in any way the common-law rules as to proximate cause. The act declares, in section 1, that liability shall exist if the injury or death, as the case may be, was one '*resulting in whole or in part from* the negligence of any of the officers, agents or employees of such carrier, or *by reason* of any defect or insufficiency, *due to* its negligence, in its cars . . . or other equipment.' In identical language the same conditions of liability are restated in section 2 of the Liability Act. By section 3 contributory negligence is eliminated as a factor in determining liability, and by section 4 assumption of risk is likewise eliminated in those cases wherein a violation by the defendant carrier of any of the Federal safety statutes 'contributed to the injury of such employee.' Disregarding the purely negative influence upon the question of liability of the defense of assumption of risk, and considering only the positive factors, negligence of the employer and want of care on the part of the employee, it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of the most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found any negligent act or omission on the part of the carrier to which such injury was even in part due, then liability for such injury shall fall upon the carrier. . . . (p. 1703). In the words of *Mr. Justice Holmes:* 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' "

With the facts above set forth and the law as stated, and taking all the evidence, circumstantial and direct, the Safety Appliance Act, and the entire facts and circumstances of this case, we think the evidence was sufficient to be submitted to the jury on negligence and proximate cause as to both defendants. The burden is on plaintiff as to negligence and on the defendants as to contributory negligence and assumption of risk. *Speas v. Bank,* 188 N. C., 524.

"Contributory negligence under the Federal Employers' Liability Act has been defined by the United States Supreme Court in the following language: 'Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use.' *Seaboard Air Line Ry. Co. v. Horton,* 233 U. S., 492, 58 L. Ed., 1062. In another case before the Supreme Court of the United States the following definition of contributory negligence was approved: 'Contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of a defendant, is the proximate cause of the injury.' *Norfolk & W. R. Co. v. Earnest,* 229 U. S., 114, 57 L. Ed., 1096. Roberts, *supra,* p. 218, sec. 112." *Inge v. R. R.,* 192 N. C., at p. 531; 273 U. S., 753.

"A servant does not assume the extraordinary and unusual risks of the employment, and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duties. But only those risks are assumed which the employment involves after the employer has done everything that he is bound to do for the purpose of securing the safety of his servants, that is, he does not assume the risk of injury from the negligence of the master." Richey, Federal Employers' Liability Act (2 ed.), p. 179; *Pyatt v. R. R.,* 199 N. C., at p. 404.

So far as extraordinary hazards are concerned, an interstate railway employee may assume that the employer and his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and dangers arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. *Chicago, R. I. & P. R. Co. v. Ward,* 252 U. S., 18.

Was defendant, Seaboard, entitled to an instruction that evidence offered by its codefendant, Southern, and by plaintiff, in rebuttal could not be considered against defendant Seaboard? We think not. The evidence on the part of plaintiff was to the effect that defendants were joint *tort-feasors.* Was Seaboard counsel entitled to the concluding speech to the jury, having introduced no evidence? We think not.

"This question of practice has not been heretofore presented. It is the recollection of the members of this Court that the practice has been, that where one defendant introduces evidence, that gives the right to begin and conclude the argument to the State, and we adopt that view as the better rule. If there were several defendants, the rule claimed by the defendant would be inconvenient." *S. v. Robinson,* 124 N. C., at p. 802.

The defendant, Seaboard, relied on Rule 3 of Rules of Practice in North Carolina Superior Courts, as follows: "In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel." This rule is not controlling as interpreted by defendant, Seaboard. This action is against joint *tort-feasors.*

Taking the charge as a whole, we think the court below correctly instructed the jury on the different issues relative to the Seaboard, as to the burden of proof, accurately defined negligence, contributory negligence, proximate cause, assumption of risk, and damages, and applied the law applicable to the facts. We do not think there was error in the admission and exclusion of evidence. We do not find any prejudicial or reversible error which would entitle the Seaboard Air Line Railway Company to a new trial.

As to the defense of the Southern: From the evidence we do not think the Southern can sustain its motions for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence, and the court below properly overruled the motions. Nor do we think there was error in the admission and exclusion of evidence, or in the charge of the court below.

In the decision of this case, we are treating this as an action for actionable negligence against joint *tort-feasors.* The evidence set forth what was said, and the authorities cited, in reference to the Seaboard's contentions are also mainly applicable to the Southern. The Southern in its answer denied negligence and denied that plaintiff was an employee. It set up the plea of assumption of risk and contributory negligence, and further "plaintiff failed to display a *blue flag,* as is the custom and as he was by the rules of his employer required to do, giving notice that he was engaged in making repairs on or about the said car."

The evidence as to the *blue flag* rule and custom in this section at Franklin on the "exchange track" was disputed by plaintiff. From a careful review of the evidence on both sides, and the charge of the court below, this was a question of fact and was left for the jury to determine. The exceptions and assignments of error as to the exclusion of certain general rules and customs not confined to the locality of Franklin were overruled, and in this we can see no error. The question involved was not the rule and custom of a general usage and practice prevailing elsewhere, this would not tend to give plaintiff notice. The decision as to what constitutes usage and practice is heretofore cited. Then again, plaintiff contended if there was ever such a rule of the railroad it was a dead rule as to this "exchange track" and in the Franklin locality.

In *Herring v. R. R.,* 189 N. C., at p. 290, citing numerous authorities, we find: "It is well settled law that railroad companies, in the conduct of their business, have a perfect right to make and promulgate reasonable rules and regulations. To be binding, they must be properly promulgated and in full force and effect—a living rule—and not revoked or abrogated by other inconsistent rules and regulations or orders. With knowledge or acquiescence of the master, either express or implied that they have been habitually violated, they are ordinarily regarded as a dead rule, waived, abrogated or revoked."

The Southern contended that it was not guilty of negligence and further that "on 10 December, 1927, Conductor McGee (of the Seaboard) phoned that Southern empty box car number 36859 was ready for movement, and that is all the information that I had at the time concerning the car. That was the regular way of notifying me, either by that or the agent. After I got that information I put it down on the record book and put it on the switch list to come out. I gave the directions to Conductor Yarborough as soon as he got in the office." Yarborough was the conductor of the train that ran into the crippled car while plaintiff was repairing it.

As heretofore shown, there was evidence by the contract between defendants that "equal rights with the other in and to the use of" the "exchange track," "so to be jointly owned and operated hereunder." The maintenance to be paid half by each. Then the responsibility between themselves for "injury" to "person" however resulting and "arising by reason of or in connection with the joint use by the parties hereto of the said tracks as aforesaid, shall be distributed as follows," etc. The responsibility for damages to employees by reason of concurrent negligence "shall be borne by the parties hereto in equal contribution." There being evidence *aliunde* as to both defendants being joint *tort-feasors,* the evidence of one defendant was evidence against the other.

Mr. Justice Holmes in *Union Pac. R. Co. v. Hadley,* 246 U. S., 330, before quoted, says: "We must look at the situation as a practical unit, rather than inquire into a purely logical priority."

There was evidence to the effect that the Southern earlier than was customary went on the "exchange track" to get a car which, in the exercise of due care, it knew or ought to have known was being repaired and in making the repair plaintiff would of necessity be under the car; it gave no warning before picking up the crippled car, by ringing a bell or sounding a whistle; it coupled with unusual and unnecessary force; it did not, as was the custom, stop the train before coupling and a member of the crew get on the ground and look around and see if the car was ready to be moved; it had no right, under the Safety Appliance Act, to handle a crippled car. The Seaboard knew, or in the exercise of due care ought to have known, that the Southern car was crippled when it was put by it on the "exchange track" and the plaintiff would of necessity get under the car to repair it; it omitted and neglected to find out if it had been repaired and was ready to be hauled, but omitting this duty it owed plaintiff, the Seaboard agent telephoned the Southern that the empty car was ready for movement. The evidence was to the effect that the whole set-up was equal rights of the use of the "exchange track," between the Southern and the Seaboard—a "practical unit," the "joint use" under the contract. The evidence was also to the effect that the negligence of each of the defendants contributed to plaintiff's injury, and these negligent acts were the proximate causes that produced the injury, and both are liable as joint *tort-feasors.* The combined negligence of both produced the injury.

The Southern contended that plaintiff was employed alone by the Seaboard, but plaintiff's testimony is to the contrary, as follows: "On 10 December, 1927, I was employed by the Seaboard as car inspector and repairman at Franklin, Va. I was also working for the Southern as repairman; the Seaboard paid me."

On the record there was sufficient evidence of this fact, direct and circumstantial, at least enough to be submitted to the jury.

The Southern contended that the following charge was error: "In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injury sustained by the plaintiff. It is sufficient, if by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his acts or omissions, or that consequences of a generally injurious nature might have been expected." We cannot so hold.

The general rule adopted in this jurisdiction is repeatedly sustained and thus stated in *Hudson v. R. R.*, 176 N. C., at p. 492: "In support of the first two propositions the defendant relies on the definition of proximate cause, in *Ramsbottom v. R. R.*, 138 N. C., 41, approved in *Bowers v. R. R.*, 144 N. C., 686, and in *Chancey v. R. R.*, 174 N. C., 351, as 'A cause that produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was prŏbable under all the facts as they existed,' to which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.' "

The charge above is taken from 21 A. & E. Ency. Law (2d ed.), p. 487, quoted in the *Hudson case, supra.* The *Hudson case* was against the Seaboard and tried under Federal Employers' Liability Act. We think the decisions of the Federal Court sustain the charge.

In regard to the third issue: "Was the plaintiff engaged in interstate commerce at the time of his injury?" We think on the issue there was some evidence to be submitted to the jury, and the Seaboard's admission, the competency of this kind of evidence on the record has heretofore been gone into. The evidence being to the effect that both defendants were joint *tort-feasors.*

The Southern contends that the Safety Appliance Act had no bearing on the case. So far as the Southern was concerned, its acts in relation to contributing to plaintiff's injury was bottomed on other acts of negligence on its part and this aspect, if so applied to the Southern, is not prejudicial.

It may be that in the joint use of the "exchange track" by the defendants, the Southern knew, or in the exercise of due care ought to have known, of the crippled car, which amounted to evidence of negligence for coupling up and hauling the crippled car under the Safety Appliance Act, and it was one of the proximate causes of plaintiff's injury.

The Federal Employer's Liability Act, in clear language, says: "For such injury or death resulting in whole or in part, from the negligence of the carrier or its employees," etc. We find: "In *Harton v. Tel. Co.*, 141 N. C., 455, the following statement of the law is quoted with approval: 'To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is, indeed, no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries. When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' See, also, 21 A. & E. (2d ed.), 495 and note." *White v. Realty Co.,* 182 N. C., at p. 537-8.

We do not think the exception and assignment of error as to the X-ray photograph can be sustained. The evidence, if competent, merely corroborated Dr. Vann, and, if error, is not prejudicial. This evidence was cumulative.

Among the many cases cited by defendants, we think the case, which both of the defendants relied on, *Chesapeake & Ohio Ry. Co. v. Mihas* (decided by Supreme Court of U. S., 25 November, 1929), 280 U. S., 102, distinguishable from the present case, as the facts are different. In this action plaintiffs set forth many contentions as to the Southern's negligence and it is in evidence that "It was customary for the trains to come into the connection track and stop before coupling to the cars and for a member of the Southern crew to get down on the ground and look around the car and see if it was ready for the Southern to move it." In the *Mihas case,* at p. 106, we find: "The evidence, however, is that the notification or warning was exclusively for persons not employees engaged in unloading cars. There was no custom or duty of that kind in respect to employees engaged on or about the tracks. If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant." This language in the *Mihas case* is consonant with the position here taken.

Taking the charge as a whole, we think the court below correctly instructed the jury as to the burden of proof on the different issues relative to the Southern, accurately defined negligence, contributory negligence, proximate cause, assumption of risk, and damages and applied the law applicable to the facts. We do not find any prejudicial or reversible error which would entitle the Southern to a new trial.

The questions involved in the trial of this action were mostly those of fact. The jury has found for plaintiff, in law we can find no prejudicial or reversible error that would warrant a new trial.

No error.

CONNOR, J., concurs in result.

ROGER M. WISE v. DARY A. RAYNOR.

(Filed 1 April, 1931.)

1. **Trusts A b—Where title to land purchased with separate estate of wife is taken in husband and wife a resulting trust is created in her favor.**

   Where lands are purchased with the money of the wife and deed made to the husband and wife for life with remainder to the son of the wife, a resulting trust in favor of the wife will be created, and her conveyance of the timber standing thereon is valid.

2. **Evidence J b—Parol evidence tending to establish resulting trust is admissible in evidence.**

   Where a deed to lands is made to the husband and wife for life with remainder over, the conveyance reciting that the purchase price was paid by both, evidence is competent to establish a resulting trust in her favor that at the time the deed was being prepared that she told the draftsman in the presence of her husband that she was furnishing the money from her separate estate and that the full title was to be conveyed to her.

3. **Evidence D f—Testimony in this case held competent as tending to corroborate testimony of defendant.**

   Where a wife seeking to engraft a resulting trust on certain lands has competently testified that the purchase price was paid by her out of her separate estate, testimony of a disinterested witness to this effect is competent in corroboration of her testimony.

4. **Same—Question asked witness on cross-examination held competent as tending to answer previous testimony tending to impeach defendant.**

   Where upon a direct examination of a witness questions are asked tending to impeach the defendant for neglect of her husband, questions asked on cross-examination to show that the defendant performed her duty to him are competent or at least not harmful.

5. **Limitation of Actions B f—In this action involving resulting trust statute held not to run against cestui que trust in possession.**

   When the wife is in possession of the lands to which title has been conveyed to her and her husband and in which she may establish a resulting trust in her favor, she being the *cestui que trust* in possession, neither the three- nor ten-year statute of limitations will bar her right, there having been no act of disclaimer or act of the husband which would set the statute in motion against her.

APPEAL by plaintiff from *Devin, J.*, and a jury, at October Term, 1930, of WAYNE. No error.

This is an action brought by plaintiff against the defendant to restrain her from cutting timber. The plaintiff contends that he was owner in fee of a certain tract of land subject to the life estate of the defendant.

The defendant set up in her answer: "That at the time the land was purchased, it was agreed between the answering defendant and Junius H. Raynor, that the deed should be made to this answering defendant, conveying the said land to her in fee simple; that the said funds were entrusted by this answering defendant to Julius H. Raynor, as a trustee for her; that the said lands were conveyed to Julius H. Raynor and this answering defendant for life and then to Roger M. Wise, that the said Julius H. Raynor and Roger M. Wise, held any and all interest in the said lands, as trustee for this answering defendant." The deed was made 30 November, 1901, by Zilphia C. Boyette to Julius H. Raynor and Dary A. Raynor, his wife. It contains the following: "The condition of this deed is such that after the death of the said Julius H. Raynor and wife, Dary A. Raynor, the title to the said hereby conveyed lands is to be vested in Roger Wise, the son of Dary A. Raynor, and the lawful heirs of his body. . . . To have and to hold, the aforesaid tract of land and all privileges and appurtenances thereunto belonging to the said Julius H. Raynor and wife, Dary A. Raynor, during their lives, and then to the said Roger Wise and heirs of his body, to their only use and behoof."

The prayer of the answer was to the effect that the plaintiff be declared a trustee of a parol and resulting trust for the *cestui que trust,* the defendant. The plaintiff replied and as a defense set up that the land was paid for solely by Julius H. Raynor, and further pleaded the statute of limitations. The restraining order was continued until the hearing. Julius H. Raynor died 17 January, 1927. The present action was instituted 2 January, 1930.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendant, Dary A. Raynor, furnish the money for the purchase of the land described in the pleadings and was deed therefor taken in name of Julius H. Raynor and Dary A. Raynor for their lives, with remainder to plaintiff, Wise, without the knowledge and consent of said Dary A. Raynor, as alleged in the answer? Answer: Yes.

2. Is the claim of Dary A. Raynor, barred by the statute of limitations? Answer: No."

The plaintiff made numerous exceptions and assignments of error, and the material ones and necessary facts will be considered in the opinion.

Kenneth C. Royall, D. C. Humphrey, Dickinson & Freeman and Andrew C. McIntosh for plaintiff.

J. Faison Thomson for defendant.

CLARKSON, J. In Perry on Trusts and Trustees, Vol. 1, 7th ed. (1929), part sec. 126, p. 186, speaking to the subject of resulting trusts, citing a wealth of authorities, we find: "Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction (unless it would be enforcing a fraud to raise a resulting trust), and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." Part sec. 144, p. 234: "Probably there is no such presumption when a wife turns over property to her husband to be used by him in purchasing a definite piece of property. The natural presumption would usually be that she intended that he should act as her agent in acquiring the property and a trust would result if he took title in his own name." Part sec. 141, p. 225-6: "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust,* especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate. But if the trust is admitted, and there has been no adverse holding, lapse of time is no bar." Note 1: "Joint occupation by husband and wife is not ordinarily adverse to either's claim of a resulting trust." *Miller v. Baker,* 160 Pa. St., 172; 166 Pa. St., 414; *Berry v. Weidman,* 40 W. Va., 36; *Fawcett v. Fawcett,* 85 Wis., 332.

In the present action the deed, in the premises, says: "To her (the grantor) paid by the said Julius H. Raynor and wife, Dary A. Raynor"; and the *habendum* clause: "To have and to hold, the aforesaid tract of land and all privileges and appurtenances thereunto belonging to the said Julius H. Raynor and wife, Dary A. Raynor, during their lives, and then to the said Roger Wise and heirs of his body, to their only use and behoof."

In the case of *Deese v. Deese,* 176 N. C., at p. 527-8, is the following: "This is an action brought by Annie M. Deese against Jesse M. Deese, her husband, to declare him a trustee of a tract of land, the purchase money of which was paid by Annie M. Deese, but the title to which was taken to Jesse M. Deese and Annie M. Deese. . . . The jury, finding, by consent, that the land was purchased with the separate property of Annie M. Deese, which had been derived from the sale of land belonging to her, there was a resulting trust in favor of the wife. *Lyon v. Akin,* 78 N. C., 258; *Cunningham v. Bell,* 83 N. C., 330. Even when the wife furnishes the purchase money and requests that the deed be made to her husband there is still a resulting trust to her. *Sprinkle v. Spainhour,* 149 N. C., 223, which says: 'It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife that the spouses be *jointly entitled* as well as jointly named in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband.' "

In *Tire Co. v. Lester,* 190 N. C., at p. 416, we find: "The payment of the purchase money raises a resulting trust in favor of him who 'furnishes' or 'pays' or 'owns' the purchase money, unless a contrary intention, or a contrary presumption of law, prevents. (Citing numerous authorities.) This trust arises between husband and wife, in favor of the wife, when land was deeded to both husband and wife (citing numerous authorities)."

In *Carter v. Oxendine,* 193 N. C., at p. 480: "It is thoroughly established by law in this State that if a husband conveys land to his wife, or procures the title to be made to her by another, that the law presumes it is a gift to the wife. *Singleton v. Cherry,* 168 N. C., 402; *Nelson v. Nelson,* 176 N. C., 191; *Tire Co. v. Lester,* 190 N. C., 416." *Crocker v. Vann,* 192 N. C., at p. 429; *Wallace v. Phillips,* 195 N. C., at p. 670.

26 R. C. L., part sec. 76, p. 1230: "A resulting trust may be established by parol evidence, even in direct contradiction of a warrant, patent, or deed. Resulting trusts are generally specifically excepted from the operation of the statute of frauds or statute of trusts and uses." Part sec. 75, p. 1229: "As a general rule, declarations made by a person in possession of real estate, as to his interest or title in the property, may be given in evidence against those who subsequently derive title under him, in the same manner as they could have been used against the party himself if he had not parted with his possession or interest. On the other hand it is equally well settled that no declarations of a former owner of the property, made after he had parted with his interest therein, can be received in evidence to affect the legal or equitable title to the premises. These rules are applicable to resulting trusts. . . . While evidence used to establish a resulting trust must be of facts and statements of the parties, which happened or were made contemporaneously with the purchase, an exception to this rule is that the declarations of the trustee may be received in evidence, if made at any time, to establish such a trust."

In *Norton v. McDevit,* 122 N. C., at p. 758, we find: "On the trial the plaintiff proposed to prove by one Tredway that he heard Mary, the mother of plaintiff, say that she was holding the land for her children. This was objected to by defendant and excluded by the court. We do not see why this evidence was not competent, being a declaration while in possession, explaining the manner in which she was holding the land—she being the party under whom defendant is claiming." We further find in this case at pp. 758-9: "This is not what is known as an express trust, against which the statute will not run until the trust is broken. *Hodges v. Council,* 86 N. C., 181; *Hamlin v. Mebane,* 54 N. C., 18; 2 Pomeroy Eq. Juris., secs. 988, 989, 991. Lewin on Trusts, sec. 886; *Wright v. Cain,* 93 N. C., 296. But it is a trust created by implication of law against which the statute may run. 2 Lewin, *supra,* 864; 1 Lewin, *supra,* 180; 1 Pomeroy, *supra,* sec. 155. But the plaintiff alleges that she has been in possession of this land or some part of the same all the time, since the date of the purchase and deed to her mother. If this is true, no statute has run against her, as the statute does not run against a *cestui que trust* in possession. *Stith v. McKee,* 87 N. C., 389; *Mask v. Tiller,* 89 N. C., 423." *Spence v. Pottery Co.,* 185 N. C., 218.

It is well settled, as stated in *Harris v. Harris,* 178 N. C., (quoting from *Summers v. Moore,* 113 N. C., 394), at p. 11: "In such case the burden is upon him who claims the resulting trust, and as the law gives a peculiar force and solemnity to deeds, it will not allow them to be overthrown by mere words but only by facts strong, clear and unequivocal."

In the present action there was evidence, not only of a resulting trust by reason of defendant's advancing the purchase money, but of an agreement between she and her husband that the deed should be taken in her name. We set forth the law fully as applicable to the facts in this action.

The questions contended by plaintiff involved in the appeal:

1. Did the court err, in permitting the defendant to testify that she, in the presence of Julius H. Raynor, her husband (the plaintiff being a small boy and taking no part in the purchase of the land), directed the draftsman of the deed to make the deed to herself? We think not.

In Perry on Trusts and Trustees, *supra,* part sec. 138, p. 222, is the following: "It has been stated by some writers that *after the death of the supposed nominal* purchaser, parol proof alone could not be admitted to control the express declaration of the deed; but the cases relied upon are the cases before cited on the point that parol proof is inadmissible, both before and after the death of the supposed nominal purchaser. These cases are overruled and it would seem upon principle that the death of the nominal purchaser cannot affect the admissibility of parol testimony, whatever effect it may have upon its weight."

The defendant testified: "I went with my husband to see about buying the land from Zilphia C. Boyette, who lived about 20 miles from our home. I was present when the deed was delivered. I paid the money. The deed was to be made to me. I told my husband to have it made to me. The deed was drawn by Bill Rose. Q. Did you tell him (Bill Rose) to whom the deed was to be made? To the foregoing question the plaintiff objected; objection overruled; plaintiff excepted. A. Yes, sir. I told him to make the deed to me, I could not, at the time, read or write, and never have been able to read or write or to sign my name. The first time that I knew the deed was not made to me was when I went to sell the timber last fall." The deed recites that the purchase money was paid by both Raynor and his wife. The testimony, as set forth, was a statement made contemporaneously, all the parties interested in the transaction being present, including the draftsman and presumably acting for both parties. The testimony was competent.

2. Did the court err in permitting the witness, Surles, a disinterested third party, to testify as to a conversation with Julius H. Raynor, a grantee in the deed in which Raynor stated that the defendant paid the entire purchase price of the land? We think not.

The testimony, in part, was as follows: "They were married when I was talking with them about the land, said this land they bought from Mrs. Boyette that she paid her own money for it. Mr. Raynor and Mrs. Raynor both told me that day together; said she raised hogs and chickens and stuff and paid for that land herself; that is what they told me. At that time they were living on this land. I knew her prior to her marriage, and she worked in the field, and raising hogs and chickens and stuff like that all the time."

The court below allowed this evidence to corroborate the defendant. We can see no error in this. The parties were living on the land at the time and the evidence was, in substance, the same as testified to by defendant. *Harris v. Harris,* 178 N. C., 7.

3. The issue in the case being the execution of a deed in 1901, did the court err in permitting the witness, Brafford, to testify that the defendant, Raynor, "looked after" her husband for a few years prior to his death in 1927? There is no merit in this contention.

This was asked on cross-examination. Bradford on examination, among other things, testified: "Ever since I have known her she always had a little money. Of course, I have only known her since she was married to Mr. Raynor. I know that Mr. Wise employed my mother to wait on his mother while she was sick. Both I and my mother have worked there looking after Mr. and Mrs. Wise." The direct examination indicated impeachment of defendant for neglect of her husband, and plaintiff had to employ witness and his mother to look after them. The cross-examination was directed to show that the defendant performed this duty and looked after her husband and to negative implication of neglect on her part when she had money to do so. The evidence was of little import. The answer from Bradford was "Well she did all she could." We think it competent and at least not harmful.

4. Did the court err in charging the jury that the determination of the first and principal issue of the case depended on an application of the doctrine of the resulting trusts? From the authorities set forth above, we think the court below unquestionably correct in the charge.

The court might have gone further, as there was evidence not only that defendant's money went into the land, but there was evidence to the effect that it was agreed that the deed should be made to defendant, and the draftsman at the time was instructed by defendant to make the deed to the defendant. We do not understand that a *married woman* is under the same legal obligation to provide for her children as the husband to his wife and children—the husband is under compulsion of law to support the wife and children. In fact, defendant being a married woman at the time, she could not convey her land to her husband without complying with C. S., 2575. Nor can a *feme covert* create a parol trust in land—to do so would be to avoid the Constitution and statutes made to protect her. The Constitution and statutes require that in order to convey land the written assent of the husband is required and her privy examination, as required by the statutes, are essential. *Carter v. Oxendine,* 193 N. C., at p. 480.

5. Did the court err in giving to the jury conflicting instructions relative to the statute of limitations?

The defendant was the *cestui que trust,* in possession and the statute under the facts and circumstances of this case did not bar her. *Norton case, supra.*

In *Marshall v. Hammock,* 195 N. C., at p. 501, we find: "As a rule lapse of time is not a bar as between trustee and *cestui que trust,* but if the former, with knowledge of the latter disclaims the trust either expressly or by acts which necessarily imply a disclaimer, the unbroken possession follows in the trustee or in those claiming under him, for a period equal to that prescribed in the act of limitation to constitute a bar, the lapse of time under such circumstances may be relied upon as a defense. *Coxe v. Carson,* 169 N. C., 132. . . . (p. 502.) We have held that an action to have a party declared a trustee is barred by the lapse of ten years. *Hospital v. Nicholson,* 190 N. C., 119; *Sexton v. Farrington,* 185 N. C., 339." See *Nissen v. Baker,* 198 N. C., 433; *Sorrell v. Sorrell,* 198 N. C., 460.

The present action was brought within three years after the death of Raynor. Defendant in this action set up defense of resulting trust. Defendant testified: "The first time that I knew the deed was not made to me was when I went to sell the timber last fall." Defendant had been in the possession of the land in controversy. Neither did the three- or ten-year statute bar her under the facts and circumstances of this case. If the charge was conflicting, it was harmless.

The learned judge in the court below tried the case with his usual care. In the charge to the jury, he explained the law arising on the facts fully, clearly and accurately. We find

No error.

MRS. E. T. HOWARD v. E. T. HOWARD.

(Filed 1 April, 1931.)

1. **States A a—Where suit is brought in this State to recover for negligent injury occurring in another state the laws of the other state control.**

While a transitory cause of action may be maintained in the courts of a State other than the one in which it occurred, the *lex loci* is that of the State wherein the injury was inflicted, to be determined as a matter of law by the courts of the State wherein the action is brought by proper service on the defendant.

2. **Same—Right of wife to sue husband in this State for negligent injury inflicted in another state is controlled by laws of that state.**

The right of a wife to maintain a transitory action against her husband to recover damages alleged to have been caused by his negligent act depends upon the laws of the State wherein the injury was alleged to have been negligently inflicted on her by him.

3. **Same—Common law will be presumed to be in force in foreign jurisdiction unless its statutes and decisions to contrary are offered in evidence.**

Where the wife brings an action in this State to recover damages against her husband for negligent personal injury inflicted in another State, the common law will be presumed to exist in the foreign jurisdiction unless it is made to appear in evidence that it has been changed by statute.

4. **Same—Law of the forum governs as to matters affecting remedy, rules of evidence, and burden of proof.**

The law of the forum governs in transitory actions as to matters affecting the remedy, the rules of evidence, the burden of proof, and exceptions within the scope of private international law.

5. **Evidence I a—Where laws of another state are material they may be proven by its authorized statutes and reports.**

The law of another State may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other State, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. C. S., 1749.

6. **States A a—Laws of another state must be pleaded and proven when relied on in an action in courts of this State.**

In order to recover in a transitory action under the laws of the State wherein the cause of action arose the laws of that State must be pleaded as well as proven, and the courts of this State will not take judicial notice thereof.

7. **Same—Laws of State of New Jersey governing this action held not to allow married woman to bring action in tort against husband.**

Held, in this action on a transitory cause of action brought in this State wherein the wife seeks to recover damages against her husband for an alleged negligent personal injury inflicted on her while traveling in an automobile with him in the State of New Jersey the statutes of that State relating to her separate property rights and the decisions of its courts introduced in evidence do not confer authority on her to maintain an action in tort against her husband.

8. **Same—Administering law of state not allowing wife to maintain action in tort against husband is not against public policy of this State.**

Under the common law a wife could not maintain an action in tort against her husband, and where the laws of another State applying this rule control in an action brought here, the recognition of its laws does not contradict any rule of public policy in our own State, although under our statutes such action could be maintained, nor does it result in any injustice to the citizens of this State, and such laws will be applied.

APPEAL by plaintiff from *Midyette, J.*, at November Term, 1930, of HALIFAX. At the conclusion of the evidence the court dismissed the action as in case of nonsuit. The plaintiff excepted and appealed. Affirmed.

This is an action to recover damages for personal injury caused by the alleged negligence of the defendant. The material facts as related by the plaintiff, who is the defendant's wife, are substantially as follows:

In 1928-1929 the plaintiff lived in Roanoke Rapids and taught there in a public school, receiving $1,320 as her compensation for the scholastic year. In the summer of 1929 the defendant attended a summer school in Madison, Wisconsin, and in August he met the plaintiff in Toronto, Canada, for their return by automobile to Roanoke Rapids. The defendant owned the car. The first night they stopped at Olean, N. Y., and on the second day they ate supper at Scranton, Pa. Just before dark they left Scranton and arrived at Dover, N. J., about midnight. The defendant was driving about 40 miles an hour in the residential section of Dover on a paved street in which there were streetcar tracks. A New York-Buffalo bus was in front of his car. He drove down the hill around a sharp curve at the rate of about forty miles an hour. He applied the brakes and struck the car line. The sedan skidded against an electric-light pole and the plaintiff was seriously injured; her nose and her jawbone were broken and her "whole face was a solid bruise." She suffered other injuries and was one week in a hospital in Dover. She had no control over the operation of his car. There was evidence in corroboration.

Parker & Allsbrook for plaintiff.
George C. Green for defendant.

ADAMS, J. The suit is in tort, the accident occurred in New Jersey, and the defendant has pleaded the laws of that State in bar of recovery.

The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done; that is, the measure of the defendant's duty and his liability for negligence must be determined by the law of New Jersey. Goodrich on Conflict of Laws, 188; *Hancock v. Telegraph Co.,* 142 N. C., 163; *Harrison v. R. R.,* 168 N. C., 382; *Hipps v. R. R.,* 177 N. C., 472; *Smith v. So. Ry.,* 69 S. E. (S. C.), 18. If an act does not give rise to a cause of action where it is committed the general rule is that the party who commits the act will not be liable elsewhere, and in such event it is immaterial that a cause of action would have arisen if the wrong had been done in the jurisdiction of the forum. Minor on Conflict of Laws, 479, sec. 194. "If under the *lex loci* there is a right of action, comity permits it to be prosecuted in another jurisdiction; but if under the *lex loci* no right of action is created or exists, then it exists nowhere, and can be prosecuted in no jurisdiction." *Pendar v. Machine Co.,* 35 R. I., 321, L. R. A., 1916A, 428. This statement of the law is generally accepted. *O'Reilly v. R. R.,* 5 L. R. A., 364; *Needham v. R. R.,* 38 Vt., 294; *Davis v. R. R.,* 143 Mass., 301; *Alexander v. Pennsylvania Co.,* 30 N. E. (Ohio), 69; *Boston & Maine Railroad v. Hurd,* 108 Fed., 116, 56 L. R. A., 193, Annotation; 5 R. C. L., 1038. Compare *Wall v. Hoskins,* 27 N. C., 177. The law of the forum governs as to matters affecting the remedy, the rules of evidence, the burden of proof, and exceptions within the scope of private international law. *So. Ry. v. Decker,* 62 S. E. (Ga.), 678; *Hill v. C. R. R., etc.,* 93 S. E. (Ga.), 1027; *Armstrong v. Best,* 112 N. C., 59.

It may be said, then, that the plaintiff's asserted right to maintain this action is dependent upon the laws of New Jersey. The action is personal, not real; and if it can be maintained in New Jersey, being transitory and not local, it may be prosecuted here, because by personal process the defendant was brought within the jurisdiction of the court. But it is otherwise if on the question presented the common law prevails in the foreign State. *Dennick v. R. R.,* 103 U. S., 11, 26 L. Ed., 439.

The law of another State with respect to a particular question may be proved, not only by witnesses learned in the laws of that State, but by statutes printed by authority thereof and by the decisions and opinions of the court of last resort. The decisions of the highest court of another State, when offered in evidence, must, of course, be interpreted by the trial court and not by the jury. So, likewise, as to statutes. C. S., 1749; *Harrison v. R. R., supra.* The unwritten or common law of another State may be proved as a fact by oral evidence, but in the absence of proof to the contrary it is to be presumed that the common law is there in force. C. S., 1749; *Lassiter v. R. R.,* 136 N. C., 89; *Miller v. R. R.,* 154 N. C., 441; 1 Chamberlayne's Law of Evidence, sec. 584, *et seq.*

To rebut the presumption that the common law prevails in New Jersey the plaintiff, subject to the defendant's exception, introduced certain statutes of that State relating to the rights of married women. The defendant's exception is addressed to the failure of the plaintiff to set forth in his complaint or to plead any of the statutes on which she relies.

The law of another State is as much a "question of law" as is the law of our own State. Our courts are presumed to have judicial knowledge of our public laws but not the laws of other states. We do not take judicial notice of the statutes of another State. Foreign laws and statutes must be pleaded and proved as a fact. *Hooper v. Moore,* 50 N. C., 130; *Lassiter v. R. R., supra; Hall v. R. R.,* 146 N. C., 345; McIntosh's Practice and Procedure, 355. By amendment to the complaint the plaintiff alleged that the laws of the State of New Jersey permit a wife to sue her husband for tort, as if she were unmarried.

Waiving any objection to the sufficiency of this allegation we are of opinion that the statutes offered in evidence do not confer authority upon the plaintiff to maintain the present action. Sections 12a and 12b, pages 3236, 3237, Compiled Statutes of New Jersey, authorize a married woman to bring suit for torts committed against her person or her separate property, without joining her husband therein. These statutes obviously refer to suits, not against her husband, but against other persons, because it is further provided that his failure to join in the wife's action shall not prevent his right to maintain a separate action therefor. *Peskowitz v. Kramer,* 105 N. J. L., 415. If a husband is sued by his wife it can hardly be said that he may join in her suit for recovery against himself. The same reasoning applies to sections 124-17 and 124-18, chapter 232 of the Laws of 1912. The statutes relating to the right of married women to bind themselves by contract, or to retain as their separate property their wages, their earnings, and the property owned by them at the time of their marriage or thereafter acquired, or to convey or devise their property, are not decisive of the question under consideration. We are likewise of opinion that the decisions of the New Jersey courts offered in evidence at the trial do not establish the right to maintain this action.

In *Laszewski v. Laszewski,* 99 N. J. Eq., 25, determined in 1926, the Court of Chancery made this statement: "Neither at law nor in equity can an action be maintained by a wife against her husband for personal injuries. In equity a bill filed by a wife against her husband may be maintained for the protection or restoration of her separate estate, but aside from certain relief in matrimonial causes, based on fraud or want of assent in the matrimonial contract, neither in England nor in this country, except by statute, has the right of a married woman to maintain an action against her husband, either at law or in equity, been extended to the protection of personal as distinguished from property rights. As to our Married Woman's Act, it is sufficient to say that in the absence of a clear manifestation of legislative intent to effect so radical a change in our long established rules in this respect, the legislative purpose should not be declared by implication. But even if deemed changed by implication, the right of action for unliquidated damages would necessarily be pursued in the courts of law."

We find no authority for saying that the law has been changed by implication, for in *Sargeant v. Fedor,* 130 At., 207, the Supreme Court of New Jersey remarked that as against the husband the common-law rule of liability is adhered to in that State.

Under the common law neither spouse could maintain an action in tort against the other. *Phillips v. Barnet,* 1 Q. B. D., 436; *Crowell v. Crowell,* 180 N. C., 516; *Roberts v. Roberts,* 185 N. C., 566. Not denying this statement of the law, the plaintiff contends by way of avoiding its present application that the undisputed facts bring her case within two of the established exceptions to the general rule—that is, that a State will not enforce a foreign law (1) where its enforcement would contravene some established and important policy of the State of the forum or (2) would involve injustice and injury to the people of the forum.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation shall be allowed to operate within the dominion of another nation depends upon the rule of comity; and comity is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation. *Hilton v. Guyot,* 159 U. S., 113, 163, 40 L. Ed., 95, 108. But the rule of comity is not confined to nations; it applies also to the States, whose "deep and vital interests bind them so closely together." *Bank v. Earle,* 13 Pet., 519, 590, 10 L. Ed., 274, 309. It is true that foreign laws will not commonly be enforced if their enforcement would run counter to the settled policy of the forum. So, the question arising here is whether the common law as administered in New Jersey in actions of tort between wife and husband contravenes the settled public policy of this State. The only asserted ground of contravention seems to be a difference in the law of the two states. Under our law a wife may maintain a suit against her husband for a tortious act. *Crowell v. Crowell, supra; Roberts v. Roberts, supra.* But the fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other. "It by no means follows that because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. . . . To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens." *Herrick v. R. R.,* 31 Minn., 11, 47 A. R., 771; Goodrich on Conflict of Laws, 199. In *Loucks v. Standard Oil Co.,* 120 N. E., 198, the Court of Appeals of New York, in an opinion delivered by *Cardozo, J.,* used this language: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary., It is not to be exalted into an indispensable condition. The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles."

Questions relating to public policy often involve a distinction between legislation and the approval, or adoption, and enforcement of a public law. The latter may and the former may not constitute a rule of policy. The distinction is pointed out in *Thompson v. Taylor,* 54 L. R. A. (N. J.), 585, in the words following: "The distinction between regulative legislation and the adoption of a principle of public law is too important to lose sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an illustration of the adoption of a principle which so long as it was adhered to, constituted a rule of public policy. When, however, civilized states became satisfied that the welfare of society was not best served by the maintenance of this principle it was abandoned by the recognition of its opposite, viz., that married women possessed capacity to contract. The questions that then arose, viz., what contract may they make, and what may they not? while calling for the exercise of legislative discretion based upon considerations that affected a large class of individuals, did not, either in theory or in fact, involve any principle upon which the general welfare of the body of citizens of the State was assumed to rest. With the abandonment of the political principle the matter was broken up into discretionary exercises of legislative regulation in the course of which different bodies or the same legislative body at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse."

This, it seems to us, is a refutation of the contention that we should not recognize the law of New Jersey because it conflicts with principles enunciated in the cited cases of *Crowell* and *Roberts*. Application of the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum is often made in a certain class of cases—such, for example, as prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquor, and others. *S. v. Ross,* 76 N. C., 242; *Randolph v. Heath,* 171 N. C., 383; *Bluthenthal v. Kennedy,* 165 N. C., 372; *Gooch v. Faucett,* 122 N. C., 270.

The second objection is without merit. We do not see how the recognition of the New Jersey law can involve any injustice or injury to the people of North Carolina. Judgment

Affirmed.

R. G. INSCOE v. GLOBE JEWELRY COMPANY ET AL.

(Filed 1 April, 1931.)

Master and Servant D a—Held: relation of employer and independent contractor existed and employer was not liable for wrongful act of contractor.

Under a contract to collect accounts upon a percentage basis where the collecting agent is to use its own methods independently of and free from control by the employer, the relation of employer and independent contractor is created, and where the collector in collecting a debt has the debtor wrongfully and unlawfully arrested upon a criminal charge, the employer under the terms of the contract is not liable in damages resulting to the debtor therefrom.

APPEAL by plaintiff from *Grady, J.,* at January Term, 1931, of DURHAM. Affirmed.

This is an action to recover of defendants damages for the wrongful and unlawful arrest of plaintiff.

It is alleged in the complaint that the arrest was made by the defendant, G. H. Walsh, an employee of the defendant, National Detective Bureau, a corporation, for the purpose of enforcing the collection of an account due by plaintiff to the defendant, Globe Jewelry Company, and that in making said wrongful and unlawful arrest, the defendant, G. H. Walsh, and the defendant, National Detective Bureau, were acting as agents of the defendant, Globe Jewelry Company. This allegation is denied by the defendant, Globe Jewelry Company.

There was evidence tending to show that plaintiff was wrongfully and unlawfully arrested by the defendant, G. H. Walsh, an employee of the defendant, National Detective Bureau, a corporation, for the purpose of thereby enforcing the collection of an account due by plaintiff to the defendant, Globe Jewelry Company, and that as the result of such arrest, plaintiff sustained damages as alleged in the complaint. There was evidence also tending to show that the defendant, Globe Jewelry Company, had entered into a contract in writing with the defendant, National Detective Bureau, by which the said company agreed to pay to the said bureau 25 per cent of all amounts collected by said bureau on accounts due said company by its customers. As the result of the wrongful and unlawful arrest of the plaintiff in the instant case, the defendant, National Detective Bureau, collected from plaintiff a sum of money for which it accounted to the defendant, Globe Jewelry Company, in accordance with the terms of the contract.

At the close of all the evidence the defendant, Globe Jewelry Company, moved that the action as against said defendant be dismissed as of nonsuit. This motion was allowed and plaintiff excepted. On the verdict, judgment was rendered that plaintiff recover of the defendants, G. H. Walsh, and National Detective Bureau, his damages as assessed by the jury.

From judgment dismissing the action as to the defendant, Globe Jewelry Company, plaintiff appealed to the Supreme Court.

M. M. Leggett and B. Ray Olive for plaintiff.
Brawley & Gantt for defendant.

PER CURIAM. The relation between the defendant, Globe Jewelry Company, and the defendant, National Detective Bureau, as established by the contract in writing offered in evidence by the plaintiff, with respect to the collection of accounts due by its customers to the company, is not that of principal and agent, or of master and servant; it is rather that of employer and independent contractor. 14 R. C. L., 67.

By the terms of the contract the Detective Bureau, among other things, agreed to undertake the collection of accounts due the company by its customers, and the company agreed to pay to the Detective Bureau as commissions for its services in making collections, 25 per cent of the amounts collected on said accounts. The company had no right under the contract to direct the manner in which the accounts should be collected, or to control the Detective Bureau while undertaking to collect the accounts. The Detective Bureau was not the agent or servant of the company. It undertook to collect the accounts in its own way free from the control of its employer, Globe Jewelry Company.

On the facts shown by all the evidence, the defendant, Globe Jewelry Company, was not liable to the plaintiff for the conduct of the defendant, National Detective Bureau or its employee, G. H. Walsh, which, as shown by all the evidence, was wrongful and unlawful. There was no error in the judgment dismissing the action of plaintiff as to the defendant, Globe Jewelry Company. The judgment is

Affirmed.

WAYLAND S. JONES v. C. M. VANSTORY, JOHN J. PHOENIX, W. C. WICKER ET AL.

(Filed 8 April, 1931.)

1. **Process B a—Personal service on directors of corporation as trustees is not service on corporation.**

   The statutory provisions as to service of summons on private corporations must be observed, C. S., 483, and where individuals, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named.

2. **Limitation of Actions B g—Where joinder of defendant constitutes new action time will be computed as of date of service on him.**

   Where certain named individuals, directors of a corporation, are served with summons as trustees, and as to them the plaintiff takes a voluntary nonsuit and moves that the corporation be made the defendant in the action, and the complaint amended, the effect of the motion is to commence a new action against the corporation, and not to amend the original complaint, and the statute of limitations as to the corporate defendant will be computed as to the date of service on it. C. S., 475.

3. **Pleadings A c—Amendment will not be allowed except to complete cause alleged and will not be allowed beyond its scope.**

   An amendment to pleadings will not be allowed to extend beyond the scope of completing the cause alleged, and where a motion is allowed which makes a new party defendant, who is sought to be held solely responsible, it constitutes a new action and not an amendment. *Fountain v. Pitt*, 171 N. C., 113, cited and distinguished.

CIVIL ACTION, before *Schenck, J.,* at June Term, 1930, of GUILFORD.

On or about 9 September, 1929, the plaintiff issued summonses to various counties for C. M. Vanstory, J. E. Vanhorn, Mrs. Emma B. Siler, W. C. Wicker, Lee A. Folger and others, who were denominated in the summons "trustees" of Masonic and Eastern Star Home. The plaintiff filed a complaint alleging that his father, James W. Jones, was the holder of a policy of life insurance in the sum of $4,000; that the said James W. Jones was desirous of becoming an inmate of the Masonic and Eastern Star Home, and that in order to have his father cared for by said home, the plaintiff, who was named beneficiary in said policy of life insurance, agreed that the policy should be changed so that the Masonic and Eastern Star Home should become beneficiary of said policy to an amount equal to two-thirds of said insurance, and that the plaintiff was to receive one-third of said insurance. In consequence of this agreement the beneficiary was changed and the plaintiff's father was admitted into the institution and remained therein until his death on or about 1 September, 1926. Thereafter, on or about 13 September, 1926, the insurance company paid to the Masonic and Eastern Star Home the sum of $4,004.80.

Acting upon the agreement, plaintiff made demand upon the trustees of the Home for one-third of said sum, to wit, $1,334.70, and upon refusal to recognize his claim, instituted the present action. The individual defendants denominated "trustees" in the summons and complaint filed a petition for a change of venue from Forsyth to Guilford County. In the petition for removal it was alleged that the Masonic and Eastern Star Home was a North Carolina corporation and that the defendants named in the summons were not trustees, but were directors of said corporation. Thereupon, on 12 October, 1929, the plaintiff made a motion to amend his complaint and all proceedings filed in the cause so as to make the Masonic and Eastern Star Home, Inc., a party defendant. The motion was allowed, and the order of removal was also allowed. Thereafter the plaintiff filed an amended complaint seeking to recover from the corporation. The alleged "trustees" filed an answer denying the allegations of the complaint and the corporation filed an answer denying the allegations of the complaint, and also pleaded the three-year statute of limitation. When the cause came on for trial the plaintiff took a voluntary nonsuit as to all defendants except the Masonic and Eastern Star Home of North Carolina, Inc.

The issues were as follows:

1. "Is the action of the plaintiff, Wayland S. Jones, barred by the statute of limitations, as alleged in the answer?"

2. "Is the plaintiff, Wayland S. Jones, entitled to recover of the defendant, Masonic and Eastern Star Home of North Carolina, Inc., one-

third of the amount collected on the policy, less amount of premiums, to wit, $1,302.08, as alleged in the complaint?

The jury answered the first issue "No," and the second issue "Yes."

From the judgment upon the verdict the defendant corporation appealed.

J. Harold McKeithan and Ingle & Rucker for plaintiff.
King, Sapp & King for defendant.

BROGDEN, J. If certain individuals are sued as trustees, and thereafter, upon motion, a corporation in which said individuals are directors, is duly made a party to the suit, does the making of such corporation a party, constitute an amendment or a new action?

The Revised Code of 1854 provided for amendments to process or pleadings "for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered thereon." This original provision has gradually been broadened into C. S., 547. This Court considered the nature of an amendment in *Camlin v. Barnes,* 50 N. C., 296. The Court said: "So, if this be an amendment, the court has power to make it. But it is not an amendment. The effect of the order is to make, and not to amend, this process. We put our decision on the ground, that whenever it is necessary to issue new process to bring in a new defendant, the operation amounts to something which exceeds an amendment, in the broadest signification in which the word has ever been used." C. S., 475, provides that a civil action shall be commenced by the issuance of a summons. The summons against the corporate defendant was issued .... day of December, 1929, and served on 6 December, 1929. If the corporation was in court by reason of the summons served upon certain individuals denominated "trustees" of the Masonic and Eastern Star Home, then it was wholly unnecessary to issue new process for the corporation.

But was the corporation in court prior to 6 December, 1929? The statute, C. S., 483, prescribes the method by which a private corporation shall be brought into court. Construing this statute in *Hatch v. R. R.,* 183 N. C., 617, it was declared: "The summons must be served on a corporation by the delivery of a copy thereof to one of certain designated officers or to a local agent (C. S., 483); and this requirement, it is held, must be strictly observed." In *Plemmons v. Improvement Co.,* 108 N. C., 615, the summons named "A. H. Bronson, president of the Southern Improvement Company," and service was duly made. This Court held that this was a service upon A. H. Bronson individually, and "was not a service upon the corporation, and it cannot, in this shorthand manner by amendment, be brought into court without service of process." Again in *Hester v. Mullen,* 107 N. C., 724, the Court wrote as follows: "Only such amendments as to parties or the cause of the action may be made as its nature and scope warranted. Amendments in this respect must be such, and only such, as are necessary to promote the completion of the action begun."

It is generally accepted that no amendment will lie which substantially changes the cause of action. *Merrill v. Merrill,* 92 N. C., 657; *Campbell v. Power Co.,* 166 N. C., 488; *Hill v. R. R.,* 195 N. C., 605; *Gibbs v. Mills,* 198 N. C., 417; McIntosh North Carolina Practice and Procedure, 512-517.

In the case at bar the complaint alleged a cause of action against the individual defendants as "trustees," and hence no cause of action was set up against the corporation. The corporation was first mentioned in the motion to make an additional party which was filed 12 October, 1929, and this motion did not contemplate an additional party for the purpose of completing an action already begun, but to substitute a party, to be held solely and exclusively liable for the claim of plaintiff. This constituted a new action so far as the corporate defendant was concerned. *Davis v. R. R., ante,* 345.

The evidence tended to show that the insurance company paid the money to the corporate defendant on 13 September, 1926. Consequently the plaintiff's cause of action accrued on said date. The motion to bring the corporation into court was made on 12 October, 1929, and the summons was served on 6 December, 1929. Either date was more than three years from the accrual of the cause of action. The trial judge instructed the jury, as a matter of law, to answer the first issue "No." This instruction was erroneous under the circumstances disclosed by the record.

Plaintiff relies upon the case of *Fountain v. Pitt,* 171 N. C., 113. In that case the Court said: "While the process ran against the board, it is apparent from it, and from the pleadings, as we have shown, that the suit was in reality against the county, and in the body of the complaint the defendant is designated as 'the county of Pitt.'" It cannot be said that the original suit in the case at bar was in reality against the corporation. Furthermore, the statute with reference to suits against county commissioners has no bearing upon suits against private corporations, as such are governed by other statutory provisions.

New trial.

STATE v. MOSE LEVY.

(Filed 8 April, 1931.)

Indictment C c—Motion to quash or in abatement on ground that finding of grand jury was based on hearsay evidence will not be granted.

Where in a prosecution of a criminal action the defendant moves to quash the bill of indictment or offers a plea in abatement on the ground that incompetent evidence was considered and that there was no competent evidence heard by the grand jury, in that the finding of a true bill was based exclusively on hearsay evidence of two witnesses: ***Held,*** the action of the trial judge in refusing to hear the testimony of the witnesses before the grand jury that their testimony before it was hearsay, is not error, the distinction between incompetent evidence and testimony of disqualified witnesses pointed out by ADAMS, J.

APPEAL by defendant from *Stack, J.,* at October Term, 1930, of DURHAM. No error.

The defendant was indicted for a breach of C. S., 4237, which is as follows: "If any person shall, with intent to commit larceny or other felony, break any seal upon a railroad car containing any goods, wares, freight or other thing of value, or shall unlawfully and wilfully break or enter into any railroad car containing any goods, wares, freight or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section."

In addition, the indictment charged the defendant with larceny and with receiving stolen property knowing it to have been stolen. The jury returned a general verdict: "Guilty thereof in manner and form as charged in the bill of indictment." Judgment was pronounced and the defendant appealed upon exceptions stated in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

McLendon & Hedrick and Long & Young for defendant.

ADAMS, J. When this case came on for trial there was another in which A. M. Maddry, J. O. D. Gholson, Arthur O'Kelly, and Luther Smith were jointly charged with the offenses for which the defendant Levy was prosecuted. A *nolle prosequi* was entered as to O'Kelly, and Maddry, Gholson and Luther Smith pleaded guilty. Before judgment was pronounced against them the case against Levy was called, and before pleading Levy moved that the indictment against him be quashed on the ground that it had been returned as a true bill upon testimony which was incompetent because based entirely upon hearsay, and that no competent evidence had been heard by the grand jury. He offered to prove this by the witnesses who had testified before that body. The trial judge refused to hear testimony to this effect, but said he would permit the defendant to prove during the trial that the bill had been returned upon "improper and insufficient evidence."

When the State rested its case the defendant introduced the two witnesses who had been called before the grand jury, each of whom would have testified (in fact Brown did testify) that his information of the defendant's participation in the offenses charged was based entirely upon hearsay. King, the other witness, then testified that he had been examined by the grand jury; whereupon the court stated that the proposed evidence was not pertinent and stopped the examination. So, the main contention of the defendant is this: not merely that incompetent evidence was considered, but that no competent evidence was heard by the grand jury, and that for the latter reason the bill should have been quashed.

Disregarding as unnecessary for our present purpose the distinction between a motion to quash an indictment and a plea in abatement, we prefer to decide the question squarely on the merits. In reference to it, investigation discloses diversity of opinion. Some of the text-books and decisions adhere to the doctrine that the grand jury should not find an indictment upon insufficient evidence. Others say that the sufficiency of the evidence before the grand jury cannot be inquired into by the Superior Court on a plea to abate or a motion to quash. By others it is written that an indictment should not be returned as a true bill upon the testimony of witnesses who are incompetent. It may be noted that confusion is sometimes caused by using the word "incompetent" as synonymous with "disqualified." Annotation, 31 A. L. R., 1479; 28 L. R. A., 324.

In *S. v. Cain*, 8 N. C., 352, it was held that a bill must be quashed if found by a grand jury upon the testimony of witnesses who were not duly sworn; and in *S. v. Roberts,* 19 N. C., 540, it was said that an indictment may be suppressed by a motion to quash or a plea to abate if it was found without evidence, or upon illegal evidence, as upon the testimony of unsworn witnesses. These cases were followed by *S. v. Barnes,* 52 N. C., 21, in which it was held that the bill should be quashed if, when the motion is made, there is no evidence before the court that the witnesses examined by the grand jury testified under oath. In *S. v. Ivey,* 100 N. C., 539, the bill was quashed because it was shown that the grand jury had acted without evidence.

The defendant seems to rely chiefly on *S. v. Coates,* 130 N. C., 701. In that case it is said: "When an indictment is found upon testimony all of which is incompetent, or of witnesses, all of whom were disqualified, the bill will be quashed; but when some of the testimony, or some of the witnesses before the grand jury, were incompetent, the Court will not go into the barren inquiry how far such testimony or such witnesses contributed to finding the bill." In construing this language we must not lose sight of the facts or of the cases cited in the opinion. The defendant Garrett Coates was indicted for an assault upon Zanie Coates. Zanie and the defendant's wife were sworn and examined as witnesses before the grand jury. The defendant moved to quash the bill because his wife had been examined against him, she being neither competent nor compellable to give evidence against her husband. C. S., 1802. She was disqualified to testify. It was long since held that the testimony of a disqualified witness should not be received. *S. v. Fellows,* 3 N. C., 340. The testimony of Zanie was competent. It will be observed, therefore, that the decision in the *Coates case* is not based upon the technical incompetency of evidence as distinguished from the disqualification of the witness. That the word "incompetent" was used in the sense of "disqualified" or "illegal" is obvious from the reference to *S. v. Tucker,* 20 Iowa, 508 (page 702 of the *Coates case): "*It is held that the admission of incompetent testimony (the wife against the husband)," etc. So it is as to other cases therein cited. In *S. v. Krider,* 78 N. C., 481, the two defendants were examined before the grand jury, each against the other. On appeal to the Supreme Court the practice was condemned, but in the Superior Court no objection had been made as to the insufficiency of the bill.

The cases to which we have referred are not authority for the defendant's position. Nor are we inclined to accept his view, although it has the support of writers whose opinions are entitled to great respect. As Underhill remarked, "It would be intolerable in practice to confine grand juries to the technical rules of evidence." Criminal Evidence (3 ed.), sec. 71. The suggested practice would hinder the trial and result in useless delay. It would often require the examination of a number of witnesses, including, perchance, members of the grand jury; it would demand of the judge that he invade the province of the grand jury or exercise the functions of a petit jury in finding the facts from conflicting evidence and passing upon the credibility of witnesses; it would turn the Superior Court into a forum for an unseemly contest between members of the grand jury and those whom they may have charged with crime. Besides, such practice is unnecessary; if the evidence is incompetent it will be excluded by the trial court.

We adhere to the decisions of this Court as heretofore declared, but are unwilling to enlarge their scope to the extent proposed by the defendant in this action.

There are several obvious reasons for refusing the defendant's prayer for instructions. We find

No error.

MRS. L. E. BREWER v. ROY MOYE AND NATIONAL VENEER COMPANY, INC.

(Filed 8 April, 1931.)

Highways B 1—Upon evidence that defendant's agents assisted in loading truck in negligent manner causing injury, nonsuit should be denied.

Where the evidence discloses that the plaintiff, while attempting to pass an unlighted log truck and trailer standing upon the highway at night, collided with a log extending about four feet from the side of the trailer in a cross-wise position, and that the agents and employees of the defendant assisted in loading the truck with knowledge that it was to be operated over a populous highway and that the projections would present imminent menace to travelers: *Held*, the evidence should have been submitted to the jury, although there was no evidence of the relation between the defendant and the driver of the truck.

CIVIL ACTION, before *Devin, J.*, at January Term, 1930, of PITT.

The evidence tended to show that on the night of 5 November, 1928, the plaintiff was a passenger in a Buick automobile, traveling along the Greenville highway toward Ayden, North Carolina, and that said automobile collided with an unlighted log truck and trailer standing upon the highway. The truck and trailer was loaded with logs, and there was testimony to the effect that one of the logs extended out about four feet beyond the trailer in a crosswise or diagonal manner, and by reason thereof when the car in which plaintiff was riding, was turned to the left to avoid the truck it struck this log protruding across the highway and resulted in serious injuries.

At the conclusion of plaintiff's evidence there was judgment of nonsuit and the plaintiff appealed.

J. C. Lanier for plaintiff.
Harding & Lee for defendant.

BROGDEN, J. The Veneer Company offered no evidence, and it does not appear what the relationship was between the Veneer Company and defendant, Roy Moye, who was driving the truck and trailer at the time of the injury complained of. It was admitted in the answer of defendant Veneer Company "that the National Veneer Company, Inc., was to load all logs on the truck, or trucks, or other means of conveyance, of said Roy Moye, with the assistance of Roy Moye in loading said logs." This admission was offered in evidence.

It is obvious that, if a truck and trailer operated upon a populous highway in the nighttime and without light, is so loaded as to allow logs or other objects placed in the truck to project beyond the line of the truck and trailer and over the highway, such loading, under the circumstances, would be a negligent act. The evidence discloses that the agents and employees of defendant Veneer Company assisted in loading the truck with knowledge that it was to be operated over and upon a populous highway and with the further knowledge that projections extending over the highway would be a present and imminent menace to travelers.

Therefore, the Court is of the opinion that the cause should have been submitted to the jury with proper instructions.

Reversed.

MAX PLOTKIN v. THE REALTY BOND COMPANY.

(Filed 8 April, 1931.)

1. **Trial G b—Where verdict is conflicting or not determinative of controversy a new trial will be awarded.**

   Where the jury's answer to the issues submitted are conflicting in their result, or are not determinative of the controversy, on appeal from a judgment entered thereon a new trial will be granted.

2. **Deeds and Conveyances D e—Answer to issues as to boundaries held conflicting and not determinative of controversy.**

   Where in an action to recover damages for breach of warranty of seizin in a deed and fraud in the sale of lands the case is submitted on the issue as to whether defendant agreed to deliver the land within certain boundaries beyond those set out in the deed, and as to whether the description in the deed was due to mutual mistake, an affirmative answer to the first issue and a negative answer to the second are conflicting and do not establish facts sufficient for the court to proceed to judgment, and on appeal by defendant from judgment in plaintiff's favor awarding damages, a new trial will be ordered.

APPEAL by defendant from *Clement, J.,* at November Term, 1930, of FORSYTH.

Civil action to recover damages (1) for breach of covenant of seizin, and (2) for fraud in the sale of a lot of land, tried on the following controverted issues:

"3. Did the defendant contract and agree to deliver to the plaintiff the land described in the line, as shown from H to E, to G, to F, to B, to J, and back to H? Answer: Yes.

"4. If not, was the description set out in the deed due to a mutual mistake between the parties, as alleged in the answer? Answer: No.

"5. What amount of damages is the plaintiff entitled to recover of the defendant? Answer: $500."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

J. M. Wells, Jr., and Jno. C. Wallace for plaintiff.
Ingle & Rucker for defendant.

STACY, C. J. The issues are either in conflict or they are not determinative of the controversy. For this reason a new trial must be awarded. *Bank v. Broom Co.,* 188 N. C., 508, 125 S. E., 12.

The third issue was apparently answered on the principle announced in *Person v. Rountree,* 2 N. C., 378, and consistently followed in this jurisdiction, that a grantee of lands will take according to the boundaries actually surveyed and pointed out at the time, notwithstanding a mistaken description inserted in the deed *(Clarke v. Aldridge,* 162 N. C., 326, 78 S. E., 216), but the answer to the fourth issue seems to negative this theory. *Wood v. Jones,* 198 N. C., 356, 151 S. E., 732.

It is conceded that the calls in the deed do not carry the description to the boundaries named in the third issue, and the question of alleged fraud was not submitted to the jury. Two causes of action are set out in the complaint, but the verdict, as it stands, establishes neither of them. Hence, the trial is inconclusive in its effect. *Holler v. Tel. Co.,* 149 N. C., 336, 63 S. E., 92. A verdict, whether upon one or many issues, should establish facts sufficient to enable the court to proceed to judgment. *Chapman-Hunt Co. v. Board of Education,* 198 N. C., 111, 150 S. E., 713.

New trial.

FARMERS BANK OF CLAYTON v. NELLIE HORNE McCULLERS AND HUSBAND, DR. E. H. McCULLERS, AND MELBA McCULLERS MISENHEIMER, EXECUTRIX.

(Filed 8 April, 1931.)

Trial D b—Directed verdict in favor of party upon whom is burden of proof is error.

The burden of proof is upon the plaintiff in his action to set aside as void against creditors a deed made by the wife to the husband or a judgment confessed by her in his favor, and a judgment in plaintiff's favor upon the pleadings is erroneous.

CIVIL ACTION, before *Lyon, Emergency Judge,* at November Special Term, 1930, of JOHNSTON.

The plaintiff instituted a suit upon certain promissory notes executed and delivered to it by Nellie Horne McCullers, wife of Dr. E. H. McCullers, and secured judgment thereon at the April Term, 1929, of the Superior Court of Johnston County. On 27 June, 1929, the present action was instituted and it was alleged in the complaint that after the rendition of said judgment the defendant had conveyed to her husband certain land described in the complaint with intent to hinder, delay and defraud the plaintiff in the collection of said judgment. It was also alleged that after the rendition of said judgment the defendant, Nellie Horne McCullers, had confessed judgment in favor of her husband in the sum of $2,600. The plaintiff asked that the deeds and the confession judgment be set aside. The defendants filed an answer denying the allegations of the complaint. The defendant, Nellie Horne McCullers, died pending suit and her executrix, Melba McCullers Misenheimer, was made a party to the action, who also filed an answer alleging that said conveyance and confession of judgment were made in good faith and for full consideration. Thereafter, the plaintiff amended the complaint alleging that the deeds from Nellie Horne McCullers to her husband, Dr. E. H. McCullers, were void for failure to comply with C. S., 2515. The cause came on for trial and the records show the following entry: "That at the November Term, 1930, Special Term of the Superior Court of Johnston County, said cause came on regularly for trial. The jury was selected, and upon the reading of the pleadings, the plaintiff moved for judgment, and the court being of the opinion that the plaintiff was entitled to recover, directed a verdict in favor of plaintiff," etc.

From judgment so rendered the defendants appealed.

Parker & Lee and Ed F. Ward for plaintiff.
F. H. Brooks and Winfield H. Lyon for defendants.

BROGDEN, J. The burden of proof upon the allegations in the complaint and amended complaint was upon the plaintiff, and in such cases the correct principles of practice forbid a directed instruction upon the pleadings in favor of the party upon whom the burden of proof rests. *House v. R. R.,* 131 N. C., 103; *Yarn Mills v. Armstrong,* 191 N. C., 125. The record shows that in a counter-statement of case on appeal by the plaintiff it appears that the deeds from Nellie Horne McCullers to her husband were offered in evidence, and that said deeds show a failure to comply with C. S., 2515. However, it is obvious that the judgment was rendered upon the pleadings.

Error.

F. B. GAULT v. TOWN OF LAKE WACCAMAW.

(Filed 8 April, 1931.)

1. **Adverse Possession A i—Title to streets may be acquired by adverse possession as against grantees of deeds giving easement therein.**

   Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of C. S., 430, by twenty years adverse possession.

2. **Dedication A b—Where owner offers to dedicate land to public offer must be accepted by municipality in order to bind offerer.**

   Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees therein and the public have the right to the use of the same, and it is in effect an offer of dedication to the public, which, in order to make it binding upon the offerer, requires acceptance in some recognized legal manner by the municipality before the offer to so dedicate has been withdrawn.

3. **Adverse Possesion A i—Where offer of dedication of streets has not been accepted, title thereto may be acquired by adverse possession.**

   The principle of law that the statute of limitations will not run against a municipality as to its street by encroachment thereon or adverse possession by its citizens applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn, and where thereafter the municipality attempts to assert its right, its claim may become a cloud upon the title of the offerer or his grantee, entitling him or them to the equitable remedy of injunction against the assertion by the municipality of such claim of right. C. S., 435.

Appeal by defendant from *Daniels, J.,* at November Term, 1930, of Columbus.

This is an injunctive proceeding brought by plaintiff against the defendant, a municipal corporation, "enjoining it from its efforts to require the plaintiff to conform to its said map or its said resolution, and that the said official map and the said resolution and the notice to the plaintiff thereunder be declared to constitute a cloud upon the plaintiff's title and removed therefrom, and that plaintiff be declared to be the owner in fee simple of his said lands, free and discharged from any effort or right of the defendant therein in accordance with its said official map."

The complaint, in paragraph 3, sets forth by metes and bounds the land in controversy and plaintiff prays that the cloud on his title be removed.

"This plaintiff is informed and believes that he is the owner of said lands above described, and especially that portion at the south end thereof which the defendant seeks to take and claim as Town Commons, and that he and those under whom he claims have had the same in actual possession under a fence and have reclaimed the same and otherwise used it continually and adversely to all persons for more than thirty years, and the said defendant, and no other person, has attempted to use the same in any respect whatsoever except under and by permission of this plaintiff and his predecessors in title."

The defendant answering says:

"3. Answering the third paragraph of the complaint defendant says that insofar as the land described therein covers or conflicts with the public streets, squares, commons or lands belonging to the town of Lake Waccamaw, as set out on a map or plat thereof, which is registered in the office of register of deeds of Columbus County in Plat Book No. 1, page 59, the same is denied, and as this defendant has no interest in the lands described in the third paragraph of the complaint which in no way covers or conflicts with the streets, squares and public commons of the defendant town as set out in the map aforesaid, it neither admits nor denies the allegations of the third paragraph of the complaint with reference to such lands."

It sets up an order of defendant requiring plaintiff to remove his fence and other obstructions on the streets, public squares and commons of the defendant which were in the town of Flemington, unincorporated, and taken into defendant town under Private Laws 1911, chapter 282. That plaintiff has trespassed on streets, public squares and commons of defendant and has attempted to lay claim by possession. That in 1852 Josiah Maultsby, the owner of the property, made a map and recorded it showing public streets, squares and commons, and executed deeds to various parties and incorporated in the deeds the following:

"And the said Josiah Maultsby doth also give, grant, bargain, sell and convey unto the said (grantee) and to all other good citizens the right and privilege to use all the streets, public squares and space between said lake (Lake Waccamaw) and said railroad opposite said town, as public highways, together with all and singular the tenements and hereditaments thereupon belonging or in any wise appertaining."

"That the said streets, public squares and commons of the town of Lake Waccamaw (Flemington) as laid out by the said Josiah Maultsby were dedicated to the use of the public and the public acquired an easement therein, and, with defendants."

A temporary restraining order was issued by Grady, J., 31 December, 1928. On 29 January, 1929, Judge Cranmer ordered that the restraining order be continued to the final hearing. At February Term, 1930, the matter was referred to Chas. G. Rose, Esq., as referee.

(Defendant excepts to the foregoing order of reference and demands a trial by jury on the issues raised by the pleadings herein.)

The referee made a report of the findings of fact and conclusions of law:

1. Josiah Maultsby owned certain lands in Columbus County, N. C., lying on the north side of Lake Waccamaw and between the lake and the Wilmington & Manchester Railroad—later the Wilmington, Columbia & Augusta Railroad—and now the Atlantic Coast Line Railroad Company, which land is now a part of the town of Lake Waccamaw, and includes the land described in paragraph 3 of the complaint.

2. Josiah Maultsby, on 13 November, 1852, executed deeds to various parties (setting them forth).

3. Attached to each of these deeds was a map or plat of the "Town of Flemington," showing each lot numbered, together with certain streets, one called "Broadway," another called "Perch Street," a space next to the lake called "Commons" and also a space designated thereon as "Public Square." The plat was transcribed in the records in the office of the register of deeds of Columbus County, N. C., on the margin of the page of Book L, where the said deeds are recorded.

4. Each of said deeds referred to in the finding No. 2 contains a clause reading: "And the said Josiah Maultsby doth also give, bargain, grant and sell to the said (grantee in the deed) and to all other good citizens, the right and privilege to use all the streets, public squares and spaces between the said lake and the said railroad opposite the said town as public highways."

5. By mesne conveyances, prior to and during the early part of the year of 1894, H. B. Short and C. O. Beers acquired the fee simple to all the lots located in the plat of the "Town of Flemington," as well as to a tract of two acres of land lying between "Flemington" and the lake. Many of the title deeds describe the lots by reference to lot number and by further reference to the registration of the plat in Book L.

6. By warranty deed dated 20 January, 1894, registered 3 March, 1894, in Book KK, page 325, in the office of register of deeds for Columbus County, H. B. Short and wife conveyed to C. O. Beers all of the lots which the grantors then owned and which were located west of Broadway, as designated on plat, together with the tract of two acres lying between "Flemington" and the sand bar of Lake Waccamaw.

7. At some time during the year of 1894 C. O. Beers erected, and those claiming under him have thereafter continuously, openly and notoriously maintained a fence, practically as now located, around all of the lots which he then owned, around the two acres of land lying north of the lake, and also including the space marked "Perch Street," and so much of the space marked "Public Square" as lies west of Broadway on the said plat of "Flemington."

8. F. B. Gault, plaintiff, under the will of C. O. Beers, owns and is in possession of all the property and rights conveyed to C. O. Beers by deed from H. B. Short and others.

9. F. B. Gault, plaintiff, and those under whom he claims, have since the date of the deed to C. O. Beers, exercised exclusive and adverse possession and control over all of the lands described in paragraph 3 of the complaint, having erected and lived in a dwelling-house on a portion of the land, having planted shrubbery, have planted pecan and other trees thereon, have cultivated portions of the same, have planted and cultivated a garden on the portion of the "Public Square" which lies west of Broadway, and have otherwise done and exercised acts consistent with complete and exclusive ownership and possession, claiming the property as their own.

10. More than twenty years ago the railroad company, by and with the consent of C. O. Beers and/or F. B. Gault, erected and for a time maintained two toilets for public use in the swamp or wood north of the lake and south of the town of "Flemington" (included in a tract of two acres), which toilets were approached by wooden walkways which, for a time, passed over the fence maintained by C. O. Beers and/or F. B. Gault. These toilets have long since been destroyed, and they are not now in use and have not been for several years.

11. About 1894 shade trees were planted by C. O. Beers and/or F. B. Gault parallel with the western line fence of the property described in paragraph 3 of the complaint, practically at a uniform distance therefrom and on the outside or eastern line of a sidewalk running on the west side of Broadway; many of these trees are twelve inches or more in diameter at their base at the present time.

12. No one has ever done any acts, consistent with a public use of the same as of right or in, or upon any portion of the land described in paragraph 3 of the complaint, or which was in any way adverse to the possession and control of F. B. Gault, and those under whom he claims.

13. The so-called "Town of Flemington" was never incorporated. No attempt was ever made at any time to exercise any corporate functions as a municipal corporation, and it was only the name of a particular location as made on the plat prepared for Josiah Maultsby, and referred to in findings 2, 3 and 4.

14. The town of Lake Waccamaw was incorporated by the General Assembly of 1911, by chapter 282 of the Private Laws of session of 1911, and has since that time maintained its existence as a municipal corporation.

15. By chapter 131 of the Private Laws of session 1911, certain trustees therein named were appointed "to take possession of and look after and protect *The Public Square* given by Josiah Maultsby to the citizens of the State of North Carolina," which said Public Square was by said act in part bounded "on the west by the street or road leading from W. C. & A. Railroad." This delimitation of the "Public Square" does not impinge upon any portion of the lands described in paragraph 3 of the complaint.

16. In 1928 the board of commissioners of the town of Lake Waccamaw caused J. A. Loughlin, surveyor, to make a complete survey and plat of the town, including as a part of the town the old "Town of Flemington." At a meeting of the board of commissioners, held on 4 December, 1928, this plat was unanimously adopted by the board as the official plat or map of the town of Lake Waccamaw, and by order of the board the same was registered in the office of the register of deeds for Columbus County, N. C., in Book of plats No. 1, at page 51.

17. In 1905 certain parties attempted to make and file four original entries on various portions of the land appearing as "commons," "public square" and other portions of the land designated on the plat of the old "Town of Flemington," to which entries protests were duly filed. F. B. Gault was later made a party to these proceedings, which was then pending in the Superior Court of Columbus County, and at the February Term, 1917, the consent judgment was entered consolidating all of the proceedings, and F. B. Gault was declared to be the owner in fee simple and entitled to the possession of the tracts of land set out and described in the four entries.

CONCLUSIONS OF LAW.

From the foregoing findings of fact the referee reaches the following conclusions of law:

1. Josiah Maultsby, in 1852, offered to dedicate to public use, for the benefit of the various lot owners, certain streets, squares and commons, as set out on the plat of "Flemington," as appears of record. Before actual acceptance or use of these properties offered, H. B. Short and C. O. Beers, having acquired the fee-simple title to all of the lots in the plat of "Flemington," had the right to withdraw the offer to dedicate and to close any and all of the properties theretofore offered and exercise exclusive ownership and control thereof.

2. There being no corporate entity in 1894, as the "Town of Flemington," all legal and equitable rights as to the squares, streets and

commons were in H. B. Short and C. O. Beers, and when C. O. Beers and those claiming under him fenced in the property on the west side of Broadway and described in paragraph 3 of the complaint, and began to exercise exclusive possession and control of the same, the statute of limitations began to run in favor of C. O. Beers, and those claiming under him.

3. Since there was no corporate existence of the "Town of Flemington," and no formal action, looking to acceptance of the offer to dedicate, could be taken for and in behalf of the general public, and since there has been no user *as of right* of the properties offered to be dedicated to the public, in the year of 1894, none of the property located within the boundaries in paragraph 3 of the complaint included any part of what could be properly designated as "Public road, street, lane, alley or public way," and the provision of section 435 of the Consolidated Statutes of North Carolina do not apply to the facts of this case.

4. F. B. Gault, the plaintiff, having since 1894 maintained open, notorious, adverse and exclusive possession and control of the property, under known and visible lines and boundaries, claiming and using it as his own, he is now the owner in fee simple, and entitled to the exclusive possession of all of the land described in paragraph 3 of the complaint, except so much as he has heretofore conveyed to Sloan.

5. F. B. Gault is entitled to a perpetual injunction, restraining and enjoining the defendant, and all persons purporting to act under its authority, from doing any act inconsistent with his fee-simple ownership thereof.

The findings of fact and conclusions of law sustained the contentions of plaintiff. The matter was heard on exceptions and assignments of error by defendant before Daniels, J., who sustained the referee's findings of fact and conclusions of law. The court below refused to submit certain issues tendered by defendant to be passed on by the jury. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

George Rountree, Homer L. Lyon and Varser, Lawrence & McIntyre for plaintiff.

E. M. Toon and McLean & Stacy for defendant.

CLARKSON, J. The first contention of the defendant: "Were the streets, squares and commons of the old (unincorporated) town of Flemington dedicated to the use of the public and accepted and used by the public, by virtue of said dedication?" On the present record, taking all the evidence, we find no facts or law to support this contention. We think there is a distinction between land that is in a municipality mapped and platted and deeds made to the lots in which streets, squares and commons are dedicated and accepted by the municipality, and land that is mapped or platted and deeds made to the lots in which streets, squares and commons are dedicated outside a municipality. As to the first attitude the following observation is made in McQuillin's Municipal Corp., Vol. 4, 2d ed., part of sec. 1662 and 1663, pp. 471-2. "Most of the streets, alleys, squares and parks in municipal corporations have been acquired by a voluntary dedication thereof by the owner to the public. The law relating to dedication is therefore of much importance as a part of the law of municipal corporations. . . . The owner's offer, either express or implied, of appropriation of land or some interest or easement therein to public use, and acceptance thereof, either express or implied (when acceptance is required) constitute dedication. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication." *Green v. Miller,* 161 N. C., 24; *Elizabeth City v. Commander,* 176 N. C., 26; *Wittson v. Dowling,* 179 N. C., 542; *Irwin v. Charlotte,* 193 N. C., 109.

When there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction the statute of limitations does not now run against the municipality or governing body. Public Laws 1891, ch. 224, C. S., 435: "No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations." *Threadgill v. Wadesboro,* 170 N. C., 641; *R. R. v. Dunn,* 183 N. C., 427. Prior to this statute, under former statutes, the maxim *"Nullum tempus aut locus occurritt regi"* did not obtain here. *Threadgill, supra.* See *Tadlock v. Mizell,* 195 N. C., 473.

McQuillin, *supra,* part sec. 1702, at p. 551, states the law thus: "The general rule, however, seems to be that the platting of land and the sale of lots pursuant thereto constitute a dedication, if it may be so called, of the public places delineated upon the plat only as between the grantor and purchaser, and that, so far as the municipality is concerned, such acts amount to a mere offer of dedication, and there is no complete dedication without an acceptance of some kind by the municipality."

In *S. v. Fisher,* 117 N. C., at p. 740, the law is stated as follows: "When the defendant opened up the street then outside the confines of the city of Greensboro (in the year 1890), if, before the subsequent passage of the act (Laws of 1891), which extended the limits so as to include it, he had sold a single one of the lots abutting on this apparent extension of North Elm Street, he and those claiming under him would have been estopped from denying the right of such purchaser and those in privity with him to use the street, as laid down in the plot and called for as his boundary line in the deed conveying it to him, to all intents and purposes as a highway, and this dedication of the easement appurtenant to the land sold would have been, as between the parties, irrevocable, though the street had never been accepted by the town for public use. *Moose v. Carson,* 104 N. C., 431. The estoppel *in pais* arising out of the fact that the grantee in such cases has been induced to part with money or its equivalent upon the representation of the grantor that a highway would be opened, makes the street as between them what it was represented to be. *Grogan v. Town of Haywood,* 4 Fed. Rep., 164. The offer of the easement to the public as well as the grant of the appurtenant right to its use as a highway would thus have been made irrevocable, and though the city of Greensboro could not have been, against the wish of its governing officers, subjected to the burden of keeping the open way in repair, yet they might have accepted, as a continuing offer to the city at any future time, the street which as between the parties to the deed the grantor could not deny was dedicated to public use. But there was no such sale and consequent estoppel to prevent the defendant from revoking a license apparently given to the public to use the extension or from recalling the offer. Whatever might have been the effect of its acceptance at an earlier period the city did not signify in the proper manner its willingness to assume the responsibility of making it a part of the highway under its care, until the alleged offer was revoked." *Harris v. Carter,* 189 N. C., at p. 298.

McQuillin, *supra,* sec. 1699, and part of 1700, p. 544-5: "Unless forbidden by statute or charter provision a municipality has authority to accept a dedication of property for the public use. Whether property outside the limits of the municipality may be accepted would seem to depend on the purpose for which the property is dedicated. . . . Unless otherwise provided by statute or charter, it is elementary that an acceptance is necessary." A municipality has not power to accept the dedication of a street outside of its territorial limits. *St. Louis v. St. Louis University,* 88 Mo., 155, 159. Dedication of streets outside of city may be accepted by the city on subsequent extension of city limits. *Smith v. Dothan,* 211 Ala., 338; *Wheeler v. Construction Co.,* 170 N. C., 427. See *Chimney Rock Co. v. Lake Lure, ante,* p. 171.

In Elliott on Roads and Streets, Vol. 1, 4th ed., part sec. 122, at p. 140, is the following: "Dedication is the setting apart of land for the public use. It is essential to every valid dedication that it should conclude the owner, and that, as against the public, it should be accepted by the proper local authorities or by general public user."

The second contention of defendant: "Is plaintiff entitled to hold possession of a portion of said streets, squares and commons by adverse possession?" We think so. Under the facts and circumstances of this case we find, in McQuillin, *supra,* part sec. 1684, p. 513-14: "There is some conflict of opinion as to whether a purchaser of a lot with reference to a plat, showing streets and alleys, has a right to insist upon the opening of a street on which his property does not abut or whether his right in regard to such streets and public ways and other public places is limited to those places on which his land abuts. The rule that the purchaser has a right, as against the original owner to have all the streets and alleys, designated upon the map, kept open and unobstructed has been laid down in a few jurisdictions." This principle prevails in this jurisdiction. *Conrad v. Land Co.,* 126 N. C., 776; *Hughes v. Clark,* 134 N. C., 457; *Sexton v. Elizabeth City,* 169 N. C., 385. See limitations in *Stephens v. Homes Co.,* 181 N. C., 335; *Homes Co. v. Falls,* 184 N. C., 426.

The town of Flemington was not incorporated, but the land was owned by one Josiah Maultsby, who made a map or plat of it, and this was attached to the conveyances and the map or plat was transcribed in the office of the register of deeds. In the conveyance to each grantee was the following: "And the said Josiah Maultsby doth also give, grant, bargain, sell and convey unto the said (grantee) and to all other good citizens the right and privilege to use all the streets, public squares and space between said lake (Lake Waccamaw) and said railroad opposite said town, as public highways, together with all and singular the tenements and hereditaments thereupon belonging or in any wise appertaining." The evidence sustained the referee's material findings of fact that the plaintiff and those under whom he claims title have been in possession of the land in controversy described by metes and bounds in paragraph 3 of the complaint under known and visible lines and boundaries adversely to all other persons for twenty years. In fact, the record shows thirty years.

The defendant town of Lake Waccamaw had no right, title, interest or jurisdiction in the unincorporated town of Flemington, the private property of others originally belonging to Maultsby. When it took in this property it did so subject to the rights of the property owners in the development. In closing up, by plaintiff and those from whom he claims, any streets, public squares and commons injunctive relief could have been resorted to by any lot owner in the development. In the *Wheeler case, supra,* at p. 429, we find: "Platting the land into lots and streets and selling the lots by reference to the map dedicated the streets thereon to the public in general and to the purchasers of the lots in particular. The intention to dedicate is manifested by the maps and deeds. *Tise v. Whitaker,* 146 N. C., 376. It is immaterial whether the streets were opened at the time of dedication or not; they must be at all times free to be opened as occasion may require. The acceptance or nonacceptance by the municipality does not affect the title thereto. *Hughes v. Clark, supra.* Injunction is the proper remedy, as is held in that case. The obstruction and closing up of the street creates a nuisance and each purchaser can, by injunction or other proper proceeding, have the nuisance abated." The land mapped or platted in the above action was located in the corporate limits of the city of Charlotte, N. C.

Any lot owner or owners who acquired a deed to any lot in the development had a legal right to have the "streets, squares and commons" platted and recorded, kept open as a "unit" or in the entirety. No lot owner did this or objected, but permitted the plaintiff and those under whom he claimed to fence up and otherwise take actual possession of the land in controversy, including the "streets, squares and commons," and plaintiff has, since 1894, had open, notorious, adverse and exclusive possession and control of the property under known and visible lines and boundaries, claiming and using it as his own. C. S., 430, is as follows: "No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability."

In *Locklear v. Savage,* 159 N. C., at p. 237-8, it is said: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner," citing numerous authorities. *Johnson v. Fry,* 195 N. C., 832. On all the evidence, from the view we take of this case, the plaintiff had a statutory title in fee to the land. Any minor acts or expressions of plaintiff are immaterial. In *Booth v. Hairston,* 193 N. C., 281, is the following observation, citing numerous authorities: "Our system of appeals is founded on public policy and appellate courts will not encourage litigation by granting a new trial which could not benefit the litigant and the result changed upon a new trial, and the nongranting was not prejudicial to his rights." The plaintiff so contends and we think the same correct.

"Upon the whole record, our contention is that the plaintiff is entitled to recover upon the facts found by the referee; in fact, there is no real conflict in the evidence and the plaintiff is entitled to recover upon the admissions. The referee so found, the trial court has approved these findings, and we submit that the judgment of the court below ought to be affirmed."

We do not think the court below erred in overruling defendant's motion for judgment as of nonsuit at the conclusion of all the evidence. C. S., 567. We think the issues not material as we construe the evidence and the view we take of the law. The exceptions and assignments of error of defendant as to the findings of fact and conclusions of law by the referee and court below cannot be sustained. On the entire record we see no prejudicial or reversible error in the judgment of the court below.

Affirmed.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. T. M. YOUNG AND S. G. HALL.

(Filed 15 April, 1931.)

1. **Highways A a—Highway Commission may establish right of way of greater width than the statutory minimum.**

   The State Highway Commission, under the authority of statute, may establish the width of the State's highways as extending thirty feet each way from the center of the road, and where it has posted signs along a highway at intervals approximating two miles prescribing such right of way, private owners of land along the route, though the State may not have acquired by condemnation or otherwise the full width so established, may not upon such unacquired lands included in the width of the sixty-foot highway create or maintain obstructions that would be a menace to public travel.

2. **Same—Ordinance of Commission giving it discretionary power to allow encroachment on right of way is not void.**

   It will be presumed that the discretionary power of the State Highway Commission to allow an encroachment upon the right of way of a highway in proper instances, where its written permission is obtained, will be justly exercised, and unless manifest abuse of this discretionary power is shown, the courts will not interfere or declare its ordinance in regard thereto void as giving the Commission power to unjustly discriminate.

3. **Eminent Domain A a—Whether taking is for public purpose is for decision of courts, extent and necessity of taking is for Legislature.**

The question of whether the purpose for which private property is taken is a public one is judicial, but the question of necessity and proper extent of the taking is legislative and subject to determination by such agency and in such way as the Legislature may designate.

4. **Eminent Domain C a—Provision that State Highway may take lands before assessing compensation does not violate constitutional rights.**

The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infraction of the due-process clause of the Federal Constitution and does not deprive an owner of notice and opportunity to be heard, and where the Commission has instituted a suit to enjoin the maintenance of an obstruction on the right of way of a State highway the owner may not set up therein that the lands had not been condemned and compensation paid, there being nothing in the record indicating a purpose to deprive the owner of notice with respect to assessment of damages.

APPEAL by defendants from *Harding, J.,* enjoining the obstruction of highways 69 and 104 in YANCEY County. Affirmed.

The judgment contains the following recital of facts:

1. It is admitted that some time prior to the act complained of, the State Highway Commission built in Yancey County State Highway No. 69, with a paved roadway eighteen feet in width, and that this highway is intersected at Micaville with State Highway No. 104, the surfaced portion of which is sixteen feet in width, and that at the time of the building of said State highways no condemnation proceeding was had, and no definite right of way was indicated on the ground with respect to either of said highways.

2. It is further admitted that the State Highway Commission did, on 16 October, 1929, pass certain ordinances, copies of which have been introduced in evidence, and that ordinance No. 23 undertakes to ordain and establish a sixty-foot right of way for all State highways, except as otherwise indicated on the ground, and that in pursuance of this ordinance signs, as indicated on the sketch introduced in evidence, were posted at intervals of approximately two miles on all State highways within the State, and were posted along both State highway routes 69 and 104, but that no one of these signs was located on the particular property of the defendants involved in this action.

3. It is further admitted that after the construction of the said highways, and after the passage of the said ordinance, and after the posting of the said signs, the defendants caused to be constructed at the intersection of said State highways 104 and 69, as shown on the sketch introduced in evidence, a filling station that extends within the said sixty-foot right of way, that is closer than thirty feet to the center of both

route 104 and route 69; that after the defendants began the construction of the said filling station, and before the same was completed, the defendants were notified by an agent of the State Highway Commission that they were within the territory claimed as State highway right of way, and that the construction of the filling station was forbidden; and that thereafter the defendants completed the construction of said filling station and are now operating the same.

4. That the defendants were at the time of laying out said highways, and now are, the owners of the land upon which said filling station has been constructed.

The ordinance referred to is as follows:

"That the right of way of all State highways, except as otherwise designated by appropriate signs on the ground, shall extend thirty feet from the center of the highway on either side and such additional width on curves as will give a clear vision from any point on the center line of said highway to a like point on such center line two hundred feet distant; and it shall be unlawful for any person to construct or maintain any structure within the limits of said right of way, except with the written permission of the State Highway Commission."

The court adjudged that the admitted facts are determinative and that no disputed facts are reserved for a jury; that the defendants be permanently restrained and enjoined from operating the filling station at the intersection of routes 69 and 104 at any point nearer than thirty feet from the center of either of the highways; and that they be ordered to remove and cease to maintain that part of the obstruction which is within the limits of the right of way extending thirty feet from the center of either highway.

The defendants excepted and appealed.

Charles Hutchins for appellants.
Charles Ross for appellee.

ADAMS, J. The statutes by which this appeal is to be determined are contained in chapter 70, article 15, of the North Carolina Code of 1927. Pursuant to authority thereby conferred the State Highway Commission built two highways in Yancey County, each with an asserted right of way of sixty feet in width. At the intersection of these highways in the village of Micaville was a piece of land owned by the defendants, on which they began the erection of a filling station. The plaintiff, having ascertained that the building would cover a part of each right of way, brought suit to restrain the defendants from maintaining the filling station on the rights of way and to compel them to remove the obstruction.

While the fundamental defense is that the plaintiff has no right of way on the defendants' property, there are several related questions which, of course, must be considered.

It was provided by the act of 1921, ch. 2, sec. 7, that the rights of way of all roads taken over under that act should be not less than thirty feet in width. The maximum width was not fixed, but on 16 October, 1929, the plaintiff, pursuant to legislative authority, prescribed sixty feet as the width of all rights of way for the State highways, except as otherwise indicated on the ground. N. C. Code, 1927, 3846(j)(b)(j). It is manifest that the rights of way described in the complaint were laid out; signs were posted on the highways numbered 69 and 104, as they were on all the State highways, at intervals of approximately two miles, although no definite right of way was indicated on the defendants' lot with respect to either route. After the ordinance was enacted and the highways were constructed and the signs were put up the defendants built the filling station, parts of which project into the highways. This is a physical fact demonstrable by observation. Before the building was completed the defendants were informed that it was on a part of each highway, and without regard to the notice they proceeded with the construction. If the house occupies part of these public highways why should the obstruction not be removed in the interest of the public safety? While availing themselves of the right to build on their lot the defendants were obligated to yield their private interests to the needs of the public, but not without proper compensation.

The defendants urge several objections. They contend that the ordinance enacted by the plaintiff was ineffective; that rules for the use of the State highways and for the placing of obstructions thereon cannot be enforced until the plaintiff shall have acquired the property in the way the law prescribes. A literal construction of the sections (3846(j) d, j) may afford a semblance of reason for this position; but the highway act must be construed in its entirety. The avowed purpose of the act was to enable the State, through the agency of an administrative body, to lay out, take over, establish, and construct certain highways throughout the State. The power to lay out and construct a highway implies the power to acquire a right of way having at least the minimum statutory width. In fact, the power to acquire rights of way is plainly conferred. N. C. Code, 1927, 3846(j). There is no ground for saying that the plaintiff could not reasonably increase the minimum statutory width; and if by resolution or ordinance it adopted a uniform rule generally applicable to the State highways we see no convincing reason for exempting the defendants from its operation.

Conceding the right of the plaintiff to make rules in proper cases, as held in *Radford v. Young,* 194 N. C., 747, the defendants insist that the ordinance in question is invalid because it enables the plaintiff to discriminate between the owners of property anywhere in the State. They suggest that a vicious discrimination is permissible under the clause which prohibits an obstruction on the right of way "except with the written permission of the State Highway Commission"; also that in enforcing the ordinance the Commission "may allow every other filling station in the State to remain nearer the highway than thirty feet."

This position results from the assumption that the State Highway Commission may purposely and wilfully abuse the discretion with which the law invests it. It is hard to see how any administrative body can function without exercising discretion; but even then the discretion must not be whimsical, or capricious, or arbitrary, or despotic. That such abuse of discretion may avoid or nullify an act is elementary.

The clause referred to, instead of being a means of obnoxious discrimination, was intended to prevent inequitable results. A building may be situated so close to water, ravine, cliff, mountain side, or other natural object that its removal from a right of way would be equivalent to its destruction, and in such circumstances the Commission should be permitted in the exercise of discretion to see that justice is administered and that public and private rights are protected. This, as we understand it, is the scope and purpose of the clause to which objection is made. In *S. v. Tenant,* 110 N. C., 609, and *Bizzell v. Goldsboro,* 192 N. C., 348, cited by the defendants, city ordinances were held invalid as an unwarranted interference with the ordinary incidents of ownership at the arbitrary will of the aldermen without valid reason for their action; but these cases involved the police power of municipal corporations and are not decisive of the present question. However, we may cite, for comparison with these: *S. v. Yopp,* 97 N. C., 477; *S. v. Hundley,* 195 N. C., 377; *Wilson v. Eureka City,* 173 U. S., 32, 43 Law Ed., 603; *New York ex rel. Lieberman v. Van De Carr,* 199 U. S., 552, 50 Law Ed., 305.

It is further contended that the plaintiff has not acquired a right of way by gift, purchase, or condemnation, and that the property of the defendants has been taken without due process of law and without just compensation. Constitution of United States, Art. V.

Whether the purpose for which private property is taken is a public one is a judicial question, but the question of necessity and of the proper extent of a taking is legislative and is subject to determination by such agency and in such way as the State may designate. The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard. *Sears v. Akron,* 246 U. S., 242, 62 Law Ed., 688; *Bragg v. Weaver,* 251 U. S., 57, 64 Law Ed., 135; *North Laramie Land Co. v. Hoffman,* 268 U. S., 276, 69 Law Ed., 953. The laying out of the rights of way by the plaintiff manifested a purpose to acquire an easement in the entire width of each highway for the use of the public, although only a part would ordinarily be used for travel. *R. R. v. McCaskill,* 94 N. C., 746, 754; *R. R. v. Olive,* 142 N. C., 257. But the mere laying out of a right of way is not in contemplation of law a full appropriation of the property within the lines. Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the Highway Commission. When such appropriation takes place the remedy prescribed by the statute is equally available to both parties. *McKinney v. Highway Commission,* 192 N. C., 670. It follows that section 3846(bb) of the N. C. Code of 1927, authorizing the Highway Commission to enter upon and take possession of the land before bringing condemnation proceedings and before making compensation is not an infraction of the due-process clause; and we find nothing in the record indicating a purpose to deprive the defendants of notice with respect to the assessment of damages. Judgment

Affirmed.

J. S. WOODS v. CITY OF DURHAM.

(Filed 15 April, 1931.)

Limitation of Actions A b—Right to recover for taking of land for street held barred by lapse of time under provision of city charter.

A city charter which provides that a grant of land by the owner for street purposes will be presumed after two years from the date it has been taken for such purposes by the city will bar the owner's right of recovery when he has failed to bring action for damages until after the limitation so fixed, and in this case *Held:* the assurance of the city engineer that the city was not taking the land at the time of the commencement of the work does not make it inequitable for the city to plead its charter in bar, it appearing that the city had then actually taken the land and had continuously used the same for street purposes without objection for more than the period stated.

APPEAL by plaintiff from *Grady, J.,* at February Term, 1931, of DURHAM. Affirmed.

This is a civil action brought by plaintiff against defendant to recover the value of certain land alleged to have been taken by defendant for street and sidewalk purposes and, also, for other alleged damage.

Foster Street, in the city of Durham, was 56 feet wide until it reached plaintiff's property, and plaintiff alleges that defendant took the following described property to continue the 56 feet width of Foster Street, until it intersected with Trinity Avenue, at a dead end, viz.:

Beginning at a stake in what is now Foster Street 11.7 feet north 86 degrees west from the southwest intersection of the present property lines on Foster Street and Trinity Avenue, and running thence south 86 degrees east 11.7 feet to a stake; thence south 4 degrees west 160 feet to a stake in the line of A. M. Rigsbee estate; thence north 86 degrees 24 minutes west 7.1 feet to a stake; thence north 2 degrees 48 minutes east 160.2 feet to a stake, the beginning corner.

The defendant denied liability and alleges that the plaintiff voluntarily and of his own free will and accord gave and permitted to be used for sidewalk purposes the said strip of land which he requested this defendant to grade, and which was so graded by this defendant at plaintiff's request in the year 1923.

Defendant alleges that by reason of plaintiff's act in requesting this defendant to grade said strip of land for sidewalk purposes in the year 1923, and having been so graded by this defendant for sidewalk purposes, that defendant is barred from any claim or right of claim for said strip of land given and used for sidewalk purposes, and pleads section 66 of the charter of the city of Durham as a complete bar to any claim by plaintiff for said strip or parcel of land, which said section 66 of the charter is as follows:

"That in the absence of any contracts with said city in relation to the lands used or occupied by it for the purpose of streets, sidewalks, alleys or other public works of said city, signed by the owner thereof or his agent, it shall be presumed that the said land has been granted to said city by the owner or owners thereof, and said city shall have good right and title thereto, and shall have, hold and enjoy the same. Unless the owner, or owners of said land, or those claiming under them shall make claim or demand for compensation within two (2) years next after said land was taken, he, or they, shall be forever barred from recovering said land, or having any compensation therefor; provided, nothing herein contained shall affect the rights of *feme coverts* or infants until two years after the removal of their respective disabilities."

The plaintiff, on cross-examination, testified in part as follows:

"I did not own the corner lot at that time. Nobody for the city told me they wanted the strip of land for a sidewalk, but they took it. I wanted it graded off, so I could fix that wall, so it would not be causing me any more trouble and expense when they came along to make a permanent job of Foster Street.

"Mr. Kueffner told me, about 1922 or 1923, they were going to widen Foster Street. I was the first one to suggest widening the street and to take the dirt off then. I spoke to the man on the steam shovel. At that time they were only grading that part of Foster Street the city claimed belonged to it.

"I don't expect they would have graded the strip for the sidewalk in front of my place unless I had asked them to do it. The sidewalk is on the same grade with the sidewalk on Trinity Avenue. The sidewalk I asked them to fix on Foster Street is the same one that is there now. It is exactly the same as they fixed it in 1923.

"I have not exercised any control over that sidewalk since 1923. I have not claimed it at all. I have not done any building or anything there. I wish I had now, though, so you fellows would have taken it for granted and stopped me."

H. W. Kueffner, director of public works, witness for defendant city, testified in part:

"I had a conversation with Mr. Woods in 1923, in my office. Late in the spring, or early summer 1923, they were grading Foster Street, making an approach of Foster Street into Trinity Avenue. We were grading 32 feet of Foster Street. Mr. Woods, at the time the shovel was working, noticed that they were only grading the roadway, and he came and asked if we would not grade a strip along his property on Foster Street, for a sidewalk, and that he wanted to fix his property in line like it would always be, and that he did not want to be bothered again; and he would be glad so he could fix his property up in permanent shape.

"I told him if he wanted that graded that we would do it. I ordered it graded and the city paid the cost. I ordered the contractor to grade eight feet wider on that side. We were about three feet away from the property of Mr. Woods at that time. I was there when the work was done. I remember an umbrella tree there. We didn't take down any trees. I don't think Mr. Woods was there when we were grading. I told him we would stake out an eight-foot sidewalk and it would remain like that. It was in April or May. That was in the spring of 1923, at the time we were grading Trinity Avenue.

"We graded into Foster Street, in order to make a proper grade approach so the two streets would meet. We graded Mr. Woods' land for the sidewalk. Foster Street was improved in 1927 and 1928. The grade was not changed in front of Mr. Woods' property. We graded a sidewalk at the request of Mr. Woods. It has been used by anybody who wanted to use it as a public sidewalk. It has been recognized as a city street and sidewalk since 1923, that is, the part next to the retaining wall. As director of public works, I superintended it for the purpose of keeping it open and clear, and it has been under the custody and control of the city since 1923."

Defendant offered in evidence section 66 of the city charter, as set out in the answer.

This action was commenced 14 August, 1929.

At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion at the close of all the evidence. The plaintiff excepted, assigned error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

Brawley & Gantt for plaintiff.
S. C. Chambers for defendant.

CLARKSON, J. We think the court below correct in allowing defendant's motion as in case of nonsuit at the close of all the evidence. We think the charter of the city of Durham, section 66, in relation to the defense of the statute of limitation properly set up in the answer and offered by the defendant in evidence. The plaintiff relies on what he alleges that the city engineer told him.

"He said: 'Yes, Woods, I will do that. I will send a man tomorrow and have the grade fixed and the line set back as far as it will be necessary to take when they made a permanent job, but mind you, we are not taking any land now.' "

But the answer to this is that defendant in 1923 did cut the bank down at its own expense and graded the street and actually took the land, and it has been used by the public until 1929, when this suit was instituted. Plaintiff put up a cement retaining wall, 4 to 6 feet high, which, including the steps, was 72 feet long—and this was done leaving the land in controversy a part of the street, occupied by the city and used by the public.

By the court:

"You mean the line of the strip—between the strip and what was left of your land?"

Answer: "Yes, sir. I built it on what is known now as the land that belongs to me outside of what they taken."

The plaintiff testified:

"Nobody for the city told me they wanted the strip of land for a sidewalk, but they took it. . . . I have not exercised any control over that sidewalk since 1923. I have not claimed it at all."

Since 1923 the land taken has been kept open and clear and used by the public as a street and sidewalk, and has been under the custody and control of the city ever since.

We do not think the expression made by the city engineer and what he testified to, in regard to this matter, under the facts and circumstances of this case, is such evidence as appeared in *Gaddis v. Road Commission,* 195 N. C., 107, and cases therein cited, in which it was held inequitable to plead the statute of limitations. The two-year statute of limitations provided in the charter started to run, in the language of the statute, "after said land was taken."

The conduct and acts of plaintiff; the city cutting down the embankment and widening the street at its expense; the plaintiff putting up the retaining wall on his property at his expense, in line with the street, widened with his permission; the land taken by the city and adverse use by the public from 1923 until this suit was instituted in 1929, are such that under the facts and circumstances of this case, the two-year statute under defendant's charter, which was pleaded, commenced to run in 1923, when the land was taken, and is sufficient to bar plaintiff from recovery in this action. *Tise v. Whitaker,* 146 N. C., 374; *City of Durham v. Wright,* 190 N. C., 568. The judgment of the court below is

Affirmed.

J. B. CURLEE v. W. S. SCALES.

(Filed 15 April, 1931.)

1. **Assault and Battery A c—Where person attempts to take property from owner, owner may use increasing force necessary for its protection.**

   Where the evidence in an action to recover damages for an assault is to the effect that during a dispute as to credits upon a check of plaintiff's held by the defendant the latter produced the check which the former seized and attempted to take away with him, whereupon the defendant seized him and struck him, or scuffled with him for its possession, an instruction is erroneous that only permitted the defendant to use such force to retain his property as would not amount to a breach of the peace, he having the right to use such increasing force as was necessary under the circumstances for the protection of his property, the question of excessive force being for the jury.

2. **Same—Owner may not kill or inflict great bodily harm in defense of property where assault on him is not feloneous.**

   The possessor of personal property for himself or as the agent or employee of another has the right to defend and protect it against aggression, and in so doing he may use such force as is reasonably necessary subject to the qualifications that, in the absence of felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted.

APPEAL by plaintiff from *Clement, J.,* at November Term, 1930, of FORSYTH.

Civil action for damages sustained by reason of an alleged assault and battery, tried in the Forsyth County Court, which resulted in a verdict and judgment for the plaintiff.

It seems that the plaintiff went into the office of the defendant to take up a $100 check, which the defendant had been holding for some time, and upon which, plaintiff contended, two payments had previously been made, one cash payment of $25 and the other a payment of $50 by means of a chattel mortgage, leaving a balance due on the check of $25. But the defendant, after getting the check from his safe and placing it on the table, stated that he had not accepted the chattel mortgage as payment on the check, and had returned the mortgage to the plaintiff by mail. The plaintiff had $25, mostly in nickels and dimes, which he counted out and placed on the table. He then picked up the check and started away with it, when the defendant grabbed the plaintiff, hit him with his fist (knocked him down according to plaintiff's testimony; scuffled with him according to defendant's version), took the check from him and put it back in his safe. This suit is to recover damages for the alleged assault and battery thus committed.

On appeal to the Superior Court, as was the defendant's right under the law *(Brock v. Ellis,* 193 N. C., 540, 137 S. E., 585), a new trial was ordered, the latter court being of opinion that error was committed by the trial court in the following instruction:

"The court instructs you, gentlemen of the jury, that a person, under the law, is allowed to use force in order to protect his own property, provided by using that force he does not commit a breach of the peace, but a person is not allowed to use sufficient force to protect his property as will amount to a breach of the peace. If it is necessary for a person to use force sufficient to constitute a breach of the peace in the protection of his property, then he must refrain from using that force and resort to the courts."

From this ruling of the Superior Court the plaintiff appeals, contending that no reversible error was committed in the County Court.

Parrish & Deal for plaintiff.
Peyton B. Abbott and Hastings & Booe for defendant.

STACY, C. J. As we understand the record, the Superior Court, in the exercise of its appellate jurisdiction, took the view, and accordingly held, that the above instruction deprived the defendant of the right to use such force as was necessary, but only such as was necessary, to protect his property, and we cannot say there was error in the ruling. *Kirkpatrick v. Crutchfield,* 178 N. C., 348, 100 S. E., 602; 2 R. C. L., 555; note 25, A. L. R., p. 542.

One in possession of property, either as owner, or as agent or servant of the owner, has the right to defend and protect it against aggression, and in so doing he may use such force as is reasonably necessary to accomplish this end, subject to the qualification that, in the absence of a felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted. *People v. Dowd,* 223 Mich., 120, 193 N. W., 884, 32 A. L. R., 1535; Note, Ann. Cas., 1917D, 296. Blackstone says: "In defense of my goods or possessions, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. . . . And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit,* for this purpose." 2 Bl. Com., 120. Indeed, it has been held that force may be used by the owner to retake property from a person who has obtained possession of it by force or fraud and is overtaken while carrying it away. *Riffel v. Letts,* 31 Cal. App., 426, 160 Pac., 845.

In *S. v. Yancey,* 74 N. C., 244, a threat to use a deadly weapon in defense of property was held justifiable, while to have carried out the threat would have been unlawful. The Court applying the doctrine, and distinguishing between necessary and excessive force, said: "The prosecutor at that time was committing a trespass upon the property of the defendant in his presence, by holding on to the defendant's saddle and claiming it as his own, and calling to another for help with the purpose of taking it by force, as the defendant had reasonable ground to believe. This conduct of the prosecutor was not such as to justify an actual battery with the knife in the first instance; but the defendant had the right to do what was necessary to make the prosecutor let go his saddle, beginning with moderate force, and increasing in the ratio of the resistance, without measuring it in golden scales. We are not left to any speculation as to whether he used too much or too little force; for the result shows that he used just enough to accomplish his purpose. If he had used more, he would have injured the prosecutor. If he had used less, and allowed the prosecutor's help to come up, he would have lost his property, or engaged in an unequal contest, with probably serious consequences." To like effect are the decisions in the two cases of *S. v. Austin,* 123 N. C., 749, and 752, 31 S. E., 731, and 1005.

The law of this jurisdiction was summarized by *Walker, J.,* in *S. v. Scott,* 142 N. C., 582, 55 S. E., 69, as follows: "A person may lawfully use so much force as is reasonably necessary to protect his property or to retake it, when it has wrongfully been taken by another or is withheld without authority; but if he use more force than is required for the purpose, he will be guilty of an assault. So if one deliberately and at the outset kills another with a deadly weapon in order to prevent a mere trespass, it is murder; and if he offers to strike with a deadly weapon or to shoot with a pistol, under the same circumstances, before resorting to a milder mode of prevention, he shows ruthlessness and a wanton disregard of human life and social duty. *S. v. Myerfield,* 61 N. C., 108.

"The right to protect person or property by the use of such force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except, perhaps, in urgent cases. The person whose right is assailed must first use moderate means before resorting to extreme measures. Clark's Cr. Law (2 ed.), 241, 242; *S. v. Crook,* 133 N. C., 672. Ordinarily, whether excessive force has been used is a question for the jury. *S. v. Goode,* 130 N. C., 651; *S. v. Taylor,* 82 N. C., 554. In *S. v. Morgan,* 25 N. C., 186, speaking of an assault with a deadly weapon to prevent a trespass, the Court, by *Gaston, J.,* says: 'It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may be rightfully redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow-being in order to save one's self from a comparatively slight wrong, which is essentially wicked and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty.' It is said in *S. v. McDonald,* 49 N. C., 19: 'Whether the deceased was in fact committing a trespass upon the property of the prisoner at the time when he was killed, and if he were, whether the prisoner could avail himself of it, as he assigned a different cause for the killing, it is unnecessary for us to decide. Admitting both of these inquiries to be decided in favor of the prisoner, the homicide is still, according to the highest authorities, murder, and murder only. To extenuate the offense in such a case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and to deter the offender from repeating the like, and it must so appear.' To the same effect is *S. v. Brandon,* 53 N. C., 463."

The question of excessive force, of course, is for the jury. *S. v. Goode, supra.*

Affirmed.

J. SAM WRIGHT v. TOWN OF LAKE WACCAMAW.

(Filed 15 April, 1931.)

1. **Eminent Domain D a—In order for town to condemn land it is required that proceedings be instituted by proper officials before tribunal.**

   In order for a municipality to establish a street or highway by condemnation it is required that condemnation proceedings be instituted by the properly constituted authorities in a proceeding regularly instituted before the proper tribunal, and an official map adopted showing "streets, parks and commons" platted thereon is not sufficient.

2. **Adverse Possession D b—City must show adverse use of land for street for twenty years in order to acquire title by presumption of grant.**

   In order for a municipality to establish the right to maintain a street on privately owned lands where an original grant from the owner has not been shown, it must show its exclusive and adverse use and control thereof for that purpose for a period of twenty years in order for an original grant by the owner or a dedication by him to be presumed, and although such adverse use may be inferred from the occupation itself when sufficient to permit the inference that the public had assumed control and was using the land adversely and as a matter of right, in this case evidence of such adverse user is held insufficient to be submitted to the jury, and a directed verdict in the owner's favor was not error.

3. **Dedication A b—Offer of dedication must be accepted by municipality.**

   An offer of dedication of land to the public must be followed by an acceptance on its part in some recognized legal manner.

APPEAL by defendant from *Daniels, J.,* at November Term, 1930, of COLUMBUS.

Action to remove an alleged cloud on title. The plaintiff owns nine acres of land on the north shore of Lake Waccamaw. In December, 1928, the defendant adopted a map purporting to show the location of its streets, squares, and public commons. The plaintiff alleged that the defendant, contrary to the rights and powers conferred by its charter, thereby attempted to take from him a strip of land thirty feet in width, including a part of his driveway and yard, although the defendant is prohibited by its charter from taking property without compensation, and that the official map constitutes a cloud upon the plaintiff's title.

The defendant denied the material allegations of the plaintiff and alleged that said squares and public commons have been used by the defendant ever since its incorporation by prescription as a matter of right; and that the streets west and in front of the plaintiff's house have been used by the public adversely under known and visible lines and boundaries as a matter of right for more than twenty years.

The following verdict was returned:

1. Is the plaintiff the owner, and in possession, of the lands described in deed from J. P. Council and J. A. Council to the plaintiff, registered in Book A-1, at page 147? Answer: Yes.

2. If so, is the defendant town entitled to use that portion of said lands that is covered by the street on the 1928 map of the defendant and designated Wright Avenue? Answer: No.

The jury was instructed as follows: If you believe the evidence in this case, or, in other words, if you find the facts as testified by the witnesses and as shown by the evidence, you will answer the first issue Yes and the second issue No.

Judgment accordingly, and appeal by defendant.

Varser, Lawrence & McIntyre for plaintiff.
R. M. Toon and McLean & Stacy for defendant.

ADAMS, J. A street or highway may be established by prescription, dedication, or condemnation. "According to the current decisions of this Court, there can be no public highway, unless it be one either established by the public authorities in a proceeding regularly constituted before the proper tribunal, or one generally used by the public over which the proper authorities have exerted control for the period of twenty years, or one dedicated to the public by the owner of the soil with the sanction of the authorities, and for the maintenance and reparation of which they are responsible." *Kennedy v. Williams,* 87 N. C., 6. This position finds support, not only in the cases cited in the opinion, but in subsequent decisions of the Court.

There is no evidence that the defendant appropriated the plaintiff's property under the law of eminent domain. The adoption of an official map did not serve the purpose of condemnation. The question is whether the defendant acquired an easement by prescription or dedication. There is no proof that the plaintiff has ever executed a grant for an easement. The defendant's principal contention is that the town acquired an easement by adverse use of the streets, squares, and commons.

In *Boyden v. Achenback,* 79 N. C., 539, it is said that where the public has used a way as a public road, and the road has been worked and kept in order by "an overseer and hands" for more than twenty years, it will be presumed that the owner dedicated it to the public. This case is cited in *Kennedy v. Williams, supra.* But in the later case of *Haggard v. Mitchell,* 180 N. C., 255, the Court said this: "In this last case, however *(Kennedy v. Williams),* the road in question had only been open and used for about six years, and while the case is undoubtedly well decided, this reference to a working by an overseer and hands is only by way of suggestion on the part of the able and learned judge who wrote the opinion, and it was by no means the effect and intention of that decision to hold that in order to establish a public way by user, there must be direct proof of formal recognition by the public authorities having charge of the matter, but such recognition and other essentials could be inferred from the occupation itself, when sufficiently general and of an extent and character as to permit the inference as stated that the public had assumed control, and were exercising it adversely and as of right. Accordingly, in the subsequent case of *S. v. Eastman,* 109 N. C., 785, indictment for nuisance in obstructing a public square, it was expressly decided that a public square was in effect a part of the public highway; that the appointment of an overseer and hands was not an essential, and in this and several of the other authorities cited, it is fully recognized that the existence of a highway can be established by other facts showing adverse user on the part of the public."

In case of a direct dedication of land to the public use there should ordinarily be some evidence of acceptance; for as declared in *S. v. Fisher,* 117 N. C., 733, 739, "The owner of land cannot, by executing a deed to the public conveying a right of way to a highway, compel the authorities to assume the burden of repairing it unless the properly constituted agents of the county or town accept it." But where dedication is relied upon as implied from adverse user or where adverse user is invoked under the doctrine of prescription there must be evidence not only that the way was used for the requisite period, but that the user was adverse. *Haggard v. Mitchell, supra; Draper v. Conner,* 187 N. C., 18; *Weaver v. Pitts,* 191 N. C., 747. The burden of showing adverse user is upon the person who asserts it. *S. v. Fisher, supra.*

An examination of the record leads us to the conclusion that there is not sufficient evidence of the adverse use by the public of the property in question to justify a finding to this effect, and that there is no error in the instruction given the jury.

No error.

S. R. HOLLEMAN v. E. S. TAYLOR AND RAWLS-DICKSON CANDY COMPANY.

(Filed 15 April, 1931.)

1. Master and Servant A a—Relation of master and servant is founded on contract giving master right to direct method and end of work.

The relation of master and servant arises out of contract and contemplates the master's right to prescribe the end and to direct the means and method of doing the work, while in the case of a factor the agent is given possession of goods with authority to sell in his own name without disclosing the name of the principal or the fact of agency.

2. **Master and Servant D a—Defendant held entitled to more specific charge as to distinction between employer and principal.**

Where, in an action against the owner of goods to recover for negligent injury inflicted by an alleged employee while distributing the goods to purchasers by automobile, there is evidence that the owner had consigned the goods to the one inflicting the injury, and did not have any control of or interest in the means of travel used by him, and was not liable for his negligent act: *Held*, an instruction failing to sufficiently charge the jury as to the distinction between master and servant and principal and agent or factor, entitles the owner to a new trial.

APPEAL by Rawls-Dickson Candy Company from *Clement, J.*, at November Term, 1930, of FORSYTH. New trial.

This is an action for the recovery of damages for injury to the plaintiff's automobile resulting from its collision with a car driven by the defendant Taylor. The collision occurred at the intersection of Glenn and Twenty-fifth streets in the city of Winston-Salem. The defendants filed separate answers denying liability and pleading contributory negligence, Taylor setting up also a cross-action against the plaintiff. The issues were answered in favor of the plaintiff and judgment was rendered against both defendants.

The plaintiff alleged that Taylor was employed by the Rawls-Dickson Candy Company to sell and distribute its goods, and at the time of the collision was acting as its servant or agent within the scope of his employment. The defendants contended that Taylor sold the goods on consignment and not in the capacity of agent or servant.

The court charged the jury that the relation of agency existed between the two defendants and that if Taylor was negligent the Rawls-Dickson Candy Company also was negligent; that is, if Taylor was liable in damages the Rawls-Dickson Company would also be liable. The appellant excepted.

Manly, Hendren & Womble for appellant, Rawls-Dickson Candy Company.

J. M. Wells, Jr., John C. Wallace and L. L. Wall for plaintiff, appellee.

ADAMS, J. The trial court was indefinite in explaining to the jury the distinction between the relation of master and servant and that of principal and agent or factor. The former relation arises out of a contract of employment between a master or employer and a servant or employee, and usually contemplates the employer's right both to prescribe the end and to direct the means and methods of doing the work.

In a specific sense a servant is one who represents the will of the master, not only in the ultimate result of the work, but in the details by which the result is accomplished. True, the law of principal and agent is an expansion of the law of master and servant, and in certain cases the distinction between the two is of slight importance. In other cases the distinction is decisive of legal rights. For example, a factor is an agent, but he is not deemed to be a servant within the range of the technical relation of master and servant. In pursuance of his business or trade he receives goods from his principal and sells them for a compensation called factorage or commission. *Winslow v. Staton,* 150 N. C., 264. The title may be in the principal, but the peculiarity of the transaction is that the owner places the goods in the hands of the agent or factor with authority to sell in his own name without disclosing the agency or the name of the principal. 11 R. C. L., 753; *Jewelry Co. v. Joyner,* 159 N. C., 644.

In the present case the jury under instructions on this point might reasonably have found from the evidence that the Rawls-Dickson Candy Company had consigned the goods to Taylor as a factor and was interested only in the collection of the price at which the goods were consigned; that the company did not own or have any interest in the car driven by Taylor; that it had nothing to do with Taylor's means of travel; and that it was not liable to the plaintiff for damages arising out of his negligence at the time of the collision. On these questions the appellant was entitled to more specific instructions. *Jeffrey v. Man. Co.,* 197 N. C., 725; *Martin v. Bus Line, ibid.,* 720.

New trial.

IN THE MATTER OF THE ESTATE OF R. H. WRIGHT, DECEASED, R. H. WRIGHT, JR., AND T. D. WRIGHT, EXECUTORS, AND M. W. BALL, ADMINISTRATOR, C. T. A., EX PARTE, AND R. H. WRIGHT, JR., AND T. D. WRIGHT, EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. H. WRIGHT, DECEASED, v. M. W. BALL, ADMINISTRATOR, C. T. A., ET AL., DEVISEES AND LEGATEES OF R. H. WRIGHT, DECEASED.

(Filed 15 April, 1931.)

1. **Executors and Administrators A e—Clerk of court has power to remove executor or administrator for cause.**

The clerk of the Superior Court in proper instances has statutory jurisdiction over the administration of the estate of decedents, and has the power to appoint administrators or administrators, *c. t. a.*, C. S., 1, 4139, and to remove executors and administrators for cause, C. S., 31, which powers are reviewable on appeal to the judge of the Superior Court of the county.

2. **Same—Upon appeal from order removing administrators and appointing others, Superior Court may retain cause in its discretion.**

The Constitutional Convention of 1875 omitting the provisions of section 17, Article IV, of the Constitution of 1868, to the effect that the clerks of the Superior Courts shall have jurisdiction as probate judges, relieved the clerks of their exclusive jurisdiction, and upon appeal from an order of the clerk removing certain executors and administrators, *c. t. a.*, and appointing others in their place, the Superior Court judge may, in the exercise of his discretional powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the Superior Court on appeal. C. S., 637.

3. **Appeal and Error J b—On appeal from order removing executor, action of court in retaining cause in its discretion is not reviewable.**

Where the Superior Court judge, upon appeal from the order of the clerk of the court in appointing or removing executors or administrators of an estate, has exercised his discretion in retaining the cause in the Superior Court instead of remanding it to the clerk, the exercise of this discretion is not reviewable on appeal to the Supreme Court.

4. **Executors and Administrators C a—On appeal from order of clerk Superior Court may retain control of administration of estate.**

Where the personal representatives of the deceased have disagreed as to the administration of the estate and have brought action for advice as to the proper management of the estate which has been consolidated with proceedings involving the removal of certain executors and administrators, *c. t. a.*, the latter may be regarded as if a motion in the civil action, and the exercise of the discretionary power of the judge of the Superior Court acquiring jurisdiction by appeal in appointing a receiver and retaining the entire matter for further orders is not held for error.

APPEAL by M. W. Ball, administrator, *c. t. a.*, and certain devisees and legatees of R. H. Wright, deceased, from *Grady, J.*, at Chambers, in Clinton, N. C., on 24 December, 1930. Affirmed.

The above-entitled causes, pending in the Superior Court of Durham County, before the clerk, were, without objection, consolidated for the hearing of a motion for the removal of R. H. Wright, Jr., and T. D. Wright, as executors of the last will and testament of R. H. Wright, deceased.

On the facts found by the clerk at said hearing R. H. Wright, Jr., and T. D. Wright, who had theretofore duly qualified before said clerk as executors of the last will and testament of R. H. Wright, deceased, and M. W. Ball, who had theretofore been appointed by and had qualified before said clerk as administrator, *c. t. a.*, of the said R. H. Wright, deceased, were removed from their respective offices and S. C. Brawley, J. O. Lunsford, and Victor Young, were appointed by the said clerk as administrators, *de bonis non, cum testamento annexo,* with directions to take charge of the estate of R. H. Wright, deceased, and to administer the same as provided by law.

R. H. Wright, Jr., and T. D. Wright, executors, and certain devisees and legatees of the said R. H. Wright, deceased, appealed from the orders of the clerk to the judge of the Superior Court of Durham County. This appeal was heard by Judge Grady, holding the Superior Courts of Durham County, at Clinton, N. C., by consent, on 23 December, 1930.

On 24 December, 1930, Judge Grady rendered judgment affirming the order of the clerk removing the said executors and administrator, *c. t. a.*, reversing the order appointing the said administrators *d. b. n.*, *c. t. a.*, and appointing the First National Bank of Durham receiver of the estate of R. H. Wright, deceased, with full power and authority to settle the said estate, in accordance with the stipulations of the "Family Agreement," executed by all the devisees and legatees of R. H. Wright, deceased, and under the orders and supervision of the judge of the Superior Court of Durham County.

From this judgment M. W. Ball, administrator, *c. t. a.*, and certain devisees and legatees of R. H. Wright, deceased, appealed to the Supreme Court.

Abernethy & Abernethy and Brawley & Gantt for appellants, M. W. Ball, administrator, c. t. a., et al.

Brooks, Parker, Smith & Wharton and W. B. Umstead for appellees, R. H. Wright, Jr., and T. D. Wright, executors, et al.

S. C. Chambers for appellee, Cora Wright Chambers.

Walter Clark for appellee, Nannie Wright Clark.

CONNOR, J. The last will and testament of R. H. Wright, who died in Durham County, North Carolina, on 4 March, 1929, was probated in common form by the clerk of the Superior Court of said county soon after the death of the testator. Thereafter, on or about 1 June, 1929, a caveat was filed in the office of said clerk to the probate of said last will and testament. The issues raised by the said caveat were duly tried at October Term, 1929, of the Superior Court of Durham County. At this trial the issues were answered by the jury in accordance with the contentions of the propounders. It was thereupon adjudged by the court that the paper-writing propounded, with the exception of certain items contained therein, which were adjudged void, is the last will and testament of R. H. Wright, deceased, and is valid as such. In accordance with the petition of both the caveators and the propounders, duly filed in the caveat proceeding, for a construction by the court of said last will and testament, it was further ordered, adjudged and decreed that under its provisions Miss Mary E. Wright, a sister of the testator, is the owner of an estate for the term of her natural life in all the property, real and personal, of every kind and description, owned by the testator at the date of his death; that the children of T. D. Wright, a deceased brother—six in number—are owners of a vested remainder in an undivided two-thirds interest in all of said property, subject to the life estate of Miss Mary E. Wright; and that Mrs. Lucy W. Ball, a sister of the testator, is the owner of an undivided one-third interest in all of said property, subject to the life estate of Miss Mary E. Wright. It was also adjudged that R. H. Wright, Jr., T. D. Wright and the First National Company, Inc., of Durham, N. C., who are named in said last will and testament as executors thereof, are the duly qualified executors of R. H. Wright, deceased.

Thereafter by an agreement in writing, executed by Miss Mary E. Wright, by all the children of T. D. Wright, deceased, and by Mrs. Lucy W. Ball, and her children and grandchildren, dated 5 November, 1929, and known as the "Family Agreement," it was agreed that the estate of R. H. Wright, deceased, should be divided and distributed in accordance with the stipulations of said agreement, and not in accordance with the provisions of the last will and testament of R. H. Wright, deceased. It was expressly agreed by all parties to said "Family Agreement" that the First National Company, Inc., of Durham, N. C., should resign as executor and trustee under the will, and that M. W. Ball, a son of Mrs. Lucy W. Ball, should be appointed by the clerk of the Superior Court of Durham County as administrator, *c. t. a.*, of R. H. Wright, deceased, and that the said estate should be managed, divided and distributed by R. H. Wright, Jr., and T. D. Wright, the executors named in the will, and M. W. Ball, administrator, *c. t. a.*, appointed by the clerk, in accordance with said "Family Agreement." The purpose and effect of this stipulation was to constitute R. H. Wright and T. D. Wright the representatives in the management and settlement of said estate of the "Wright Group," owners of two-thirds of said estate, and M. W. Ball, the representative of the "Ball Group," owners of one-third of said estate.

Subsequent to the execution of the "Family Agreement," and in accordance with its stipulations, the First National Company, Inc., of Durham, N. C., resigned as executor and trustee under the will of R. H. Wright, deceased, and M. W. Ball was appointed by the clerk of the Superior Court of Durham County, administrator, *c. t. a.*, of R. H. Wright.

Thereafter R. H. Wright, Jr., T. D. Wright and M. W. Ball, entered upon the discharge of their duties, and were engaged in the management and settlement of the estate of R. H. Wright, in accordance with the stipulations of the "Family Agreement," at the date of the commencement of the action entitled "R. H. Wright, Jr., and T. D. Wright, Executors, *v.* M. W. Ball, Administrator, *c. t. a.*, *et al.*, Devisees and Legatees of R. H. Wright, Deceased." In the petition filed in this action by R. H. Wright, Jr., and T. D. Wright, executors, it is alleged that serious and apparently irreconcilable differences in opinion as to policies to be pursued in the management and settlement of the estate have arisen between the said R. H. Wright, Jr., and T. D. Wright, executors, of the one part, and M. W. Ball, administrator, *c. t. a.*, of the other part. The relief sought in the action is a construction by the court of certain stipulations in the "Family Agreement," and advice as to the proper management and settlement of the estate. All persons who have an interest in the estate of R. H. Wright, deceased, either under his last will and testament, or under the "Family Agreement," are defendants in the action. An answer was filed to the petition by M. W. Ball, administrator, *c. t. a.*, and by certain defendants, who constitute the "Ball Group." They pray that the prayer in the petition be denied, and the action be dismissed. An answer was also filed to the petition by defendants who constitute the "Wright Group." They admit the allegations of the petition, and pray the court to make such order or orders as may be just and proper. This action was begun on 6 October, 1929.

On 7 October, 1930, M. W. Ball, as administrator, *c. t. a.*, filed his petition before the clerk of the Superior Court of Durham County, alleging certain facts on which he prayed the said clerk to remove R. H. Wright, Jr., and T. D. Wright as executors of R. H. Wright, deceased, and to recall and revoke the letters testamentary theretofore issued to them by said clerk. In his petition the said M. W. Ball states that if the clerk will remove the said executors in accordance with his prayer therein, he will resign as administrator, *c. t. a.*, "so that some disinterested, capable and competent person or trust company may be appointed to administer and settle said estate, which your petitioner believes and alleges will be to the best interest of all parties concerned." Answers were filed to this petition by the executors, as respondents, and also by members of the "Wright Group," who intervened in said proceeding for that purpose. They denied the allegations of the petition, and prayed that the prayer therein for the removal of the executors be denied, and that the proceeding be dismissed.

The action for a construction of the "Family Agreement," and for advice as to the proper management and settlement of the estate, in accordance therewith, and the proceeding before the clerk for the removal of the executors, were consolidated, without objection, by the clerk. On the facts found by the clerk at the hearing of the motion for the removal of the executors, it was ordered, adjudged and decreed "that said R. H. Wright, Jr., and T. D. Wright, executors, and M. W. Ball, administrator, *c. t. a.*, of the estate of R. H. Wright, deceased, be and they are hereby removed as executors and administrators of said estate, and that the letters testamentary and of administration heretofore issued to them be and they are hereby recalled and revoked. It is further ordered that said executors and administrator file their final account with this court as such within ten days from the date of this order and judgment, and turn over all of the property and assets of said estate which they hold as executors and administrator, *c. t. a.*, to their successors in office or to the court.

"It is further ordered that S. C. Brawley, J. O. Lunsford and Victor Young be and they are hereby appointed administrators *de bonis non, cum testamento annexo*, of said estate, and they are directed to take charge of and administer the same as provided by law, when they have qualified, and given bond in an amount to be fixed by the court. Let a copy of this judgment and order of removal be served upon the executors and Administrator Ball by the sheriff of Durham County."

From this order the executors and members of the "Wright Group" appealed to the judge of the Superior Court holding the courts of Durham County. At the hearing of this appeal by Judge Grady the findings of fact made by the clerk on which he made his order of removal, were set aside as not supported by the evidence. On the facts found by Judge Grady at the hearing of the appeal, it was ordered and adjudged that "the appointment of Messrs. Young, Brawley and Lunsford be set aside, and the same is declared null and void; that the removal of the executors and of Mr. Ball as administrator, *c. t. a.*, be approved and confirmed, for the reasons hereinbefore given, but not for the reasons given by the clerk; and it is further ordered and adjudged that the First National Bank of Durham be and the same is hereby appointed permanent receiver of the estate of R. H. Wright, deceased." The receiver, upon filing a bond in the penal sum of $100,000, to be approved by the judge presiding in the courts of the Tenth Judicial District, which includes Durham County, was authorized and directed to settle the estate of R. H. Wright, deceased, as promptly and as expeditiously as possible, in accordance with the stipulations of the "Family Agreement," and under the orders and supervision of the judge holding the Superior Courts of Durham County.

On their appeal to this Court, from the judgment of Grady, J., at Chambers, M. W. Ball, administrator, *c. t. a.*, and the devisees and legatees of R. H. Wright, deceased, constituting members of the "Ball Group," contend that there is error in said judgment, for that Judge Grady had no jurisdiction of the administration of the estate of R. H.

Wright, deceased, by reason of the appeal from the orders of the clerk of the Superior Court of Durham County, removing the executors and the administrator, *c. t. a.,* and appointing the administrators, *d. b. n., c. t. a.,* and that therefore he was without power to appoint a permanent receiver of said estate, with power and authority, conferred by said judgment, fully to administer the same, under the orders and supervision of the judge holding the Superior Courts of Durham County. They contend that conceding that Judge Grady had the power to hear said appeal, and to affirm or reverse said orders, in whole or in part, and that on the facts found by him the said power was lawfully exercised by him in the instant case, after he had affirmed the order removing the executors and the administrator, *c. t. a.,* and had reversed the order appointing the administrators, *d. b. n., c. t. a.,* he should have remanded the cause to the clerk of the Superior Court of Durham County, with directions to said clerk, after notice to all persons interested in the estate of R. H. Wright, deceased, to appoint administrators, *d. b. n., c. t. a.,* in order that said estate might be administered under the orders and supervision of said clerk.

In considering the foregoing contentions, in order to determine their validity, the first question presented for decision is whether Judge Grady, as the judge holding the Superior Courts of Durham County, on the facts shown by the record, had jurisdiction, at least concurrent with that of the clerk, of the estate of R. H. Wright, deceased, by virtue of the appeal from the orders of the clerk, removing the executors and appointing the administrators, *d. b. n., c. t. a.*

It is conceded, of course, that under the law of this State, the clerk of the Superior Court of Durham County had original jurisdiction to probate, in common form, the last will and testament of R. H. Wright, who at his death was domiciled in Durham County, C. S., 4139, and upon such probate, and upon their qualification as required by law, to issue letters testamentary to the executors named therein. C. S., 1. The said clerk also had jurisdiction, under the provisions of C. S., 31, of the proceeding for the removal of said executors and for the recall and revocation of their letters testamentary. This jurisdiction is conferred by statute. The orders of the clerk removing said executors and appointing in their stead administrators, *d. b. n., c. t. a.,* were subject to review on appeal therefrom to the judge holding the Superior Courts of Durham County. The power of the judge to affirm or to reverse, in whole or in part, said orders is conceded. *In re Will of Gulley,* 186 N. C., 78, 118 S. E., 839, *In re Battle's Estate,* 158 N. C., 388, 74 S. E., 23; *Edwards v. Cobb,* 95 N. C., 4.

The jurisdiction of the clerks of the Superior Court in this State with respect to the administration of the estates of deceased persons, in proper cases, is now altogether statutory. Section 17 of Article IV of the Constitution of 1868, to the effect that the clerks of the Superior Courts shall have jurisdiction, as probate judges, to grant letters testamentary and of administration, and to audit the accounts of executors and administrators, was stricken from the Constitution by amendments proposed by the Constitutional Convention of 1875, and subsequently ratified by the people of this State. For this reason *Hunt v. Sneed*, 64 N. C., 176, decided at January Term, 1870, of this Court, is not an authority in support of appellants' contention that the jurisdiction of the clerks of the Superior Courts of the several counties of this State is not only original, but also exclusive. In that case it was held that by virtue of the provisions of section 17 of Article IV of the Constitution of 1868, and of statutes enacted pursuant thereto, the clerks of the Superior Court had original exclusive jurisdiction of all proceedings for the settlement of estates of deceased persons. However, in his opinion in that case, *Judge Rodman* says: "Without saying that the General Assembly might not, consistently with the Constitution, have given to the judges of the Superior Courts some concurrent original jurisdiction of proceedings for the settlement of estates, we think their intention was to give jurisdiction exclusively to the clerks, except (as will be presently explained) when the remedy by injunction may become necessary as a provisional one in the course of the proceeding."

In *Cobb v. Edwards,* 95 N. C., 5, an order by the clerk of the Superior Court of Greene County for the removal of an executor, was affirmed on the appeal of the executor to the judge holding the Superior Courts of said county. The executor excepted and appealed to this Court. The judgment was affirmed, and the proceeding remanded to the Superior Court of Greene County, with direction that it be remanded to the clerk for such further action by him as might be required. In his opinion in that case, *Judge Merrimon* says: "The clerk of the Superior Court clearly had original jurisdiction of the application to remove the defendant and power to remove him in a proper case. . . . Whether the jurisdiction of the clerk is exclusive in such case, or whether the Superior Court in administering principles of equity may exercise the like original jurisdiction, are questions we are not now called upon to decide."

In *Mills v. McDaniel,* 161 N. C., 112, 76 S. E., 551, decided at Fall Term, 1912, of this Court, *Hoke, J.,* says: "Our Constitution and statutes do not now provide or recognize a probate court or probate judge as a tribunal or officer exercising a separate and independent jurisdiction. Under the law as it now exists with us, these matters of probate are chiefly referred to the clerks of the Superior Courts, and the judgments and rulings of these officers are on appeal very generally subject to the supervision and control of the court either in Chambers or in term."

In his "North Carolina Practice and Procedure," section 72, Professor McIntosh says: "The clerk has original jurisdiction in many cases which were formerly under the control of the County Court and which were later committed to him as judge of probate, such as the probate of deeds and of wills, the appointment and settlements of guardians, executors and administrators, and in special proceedings under the Code, as distinguished from civil actions. In such cases, the jurisdiction of the clerk is original, as a separate department of the court, and he may proceed to final judgment, except where issues of fact are raised. But when cases originating before the clerk come before the judge, either by appeal or otherwise, the judge acquires jurisdiction and may either remand the case or adjudicate it finally. Since the clerk has only such jurisdiction as may be given by statute, in the absence of express statutory provision he cannot exercise any general equity jurisdiction." Numerous decisions of this Court are cited in the notes in support of the text.

It is clear that by virtue of the appeal from the orders of the clerk of the Superior Court, Judge Grady, as the judge holding the Superior Courts of Durham County, acquired jurisdiction of the proceeding which was properly begun before the clerk for the removal of the executors, at least for the purpose of affirming or reversing the orders of the clerk in said proceeding, in whole or in part. Having thus acquired jurisdiction, by virtue of the statute, C. S., 637, it was within his discretion as to whether, after he had affirmed the order removing the executors, and reversed the order appointing the administrators, *d. b. n., c. t. a.,* he should remand or retain the proceeding for such orders as he deemed for the best interest of all parties to the proceeding. On the facts found by him, it cannot be held that Judge Grady's exercise of his discretion in the instant case, is reviewable by this Court. *Light Co. v. Reeves,* 198 N. C., 404, 151 S. E., 871; *Mfg. Co. v. Kornegay,* 195 N. C., 373, 145 S. E., 19; *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68; *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901; *Mann v. Archbell,* 186 N. C., 72, 118 S. E., 911; *In re Brown,* 185 N. C., 398, 117 S. E., 291. In the last cited case, which arose during the course of the administration of the estate of a deceased person before the clerk, and which came to the judge of the Superior Court by an appeal from an order of the clerk, it is said: "The entire matter was before the judge by the appeal, and his findings will be presumed to be based upon the evidence considered by him. . . . It will hardly be denied that by the appeal of the respondent, Mrs. Devereux, from the clerk, the entire case was constituted before the judge and he could determine all matters in controversy and make all necessary and proper orders and decrees therein. C. S., 637."

There was no error in the order of Judge Grady on the facts found by him, retaining jurisdiction of the settlement of the estate of R. H. Wright, deceased, and appointing a receiver of said estate, with full power and authority to settle said estate, in accordance with the stipulations of the "Family Agreement," and under the control and supervision of the judge holding the courts of Durham County. See *Fisher v. Trust Co.,* 138 N. C., 90, 50 S. E., 592, where it is said: "The jurisdiction of courts of equity to entertain administration suits at the instance of creditors, devisees and legatees has been uniformly recognized and frequently exercised." In that case the order of the judge appointing a receiver of the estate of a deceased person, with full power and authority to administer the estate under the orders and supervision of the judge, was affirmed by this Court, notwithstanding the fact that the estate was in course of administration by the administratrix, *c. t. a.,* under the jurisdiction of the clerk. With respect to this aspect of the case, it was said: "The facts set out, in our opinion, entitled the parties to have the aid of the court in protecting the property by the appointment of a receiver, and the adjustment of conflicting claims to the end that it might be brought to sale with an unencumbered title to the purchasers under such circumstances and conditions as would pay the debts and leave the largest possible surplus for the devisees."

The only question presented by this appeal for our decision involves the power of the judge to retain the proceeding for the removal of the executors and the appointment by the clerk of administrators *d. b. n., c. t. a.* This proceeding was consolidated, without objection, with the civil action for a construction of the stipulations of the "Family Agreement." The judge alone had jurisdiction of this action. *London v. Pelchenan,* 198 N. C., 225, 151 S. E., 189. As a result of the consolidation, the proceeding for the removal of the executors and the appointment of administrators *d. b. n., c. t. a.,* might well be regarded, for purposes of jurisdiction, as a motion in the civil action.

As we are of the opinion that Judge Grady acquired jurisdiction of the entire matter, by virtue of the appeal from the orders of the clerk, and therefore had power, in his discretion, to retain the consolidated causes and to appoint a receiver of the estate of R. H. Wright, deceased, the judgment is

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF THE COMMITTEE ON GRIEVANCES OF THE NORTH CAROLINA STATE BAR ASSOCIATION v. H. L. STRICKLAND, ATTORNEY AT LAW.

(Filed 15 April, 1931.)

1. **Attorney and Client E b—Where statutory provisions for disbarment are followed the statutes should be strictly complied with.**

The courts have inherent as well as statutory power to strike from their rolls names of attorneys who are found by reason of their conduct unfit and unworthy, and where the court proceeds under its inherent power only to the extent of appointing a committee of investigation without record of further proceedings or conclusions, and the statutory method has also been pursued, the statutes should be strictly followed. C. S., 208, *et seq.*

2. **Same—Solicitor may not add to charges of Grievance Committee in disbarment proceedings.**

The statutory proceedings to disbar an attorney for improper conduct, C. S., 208, *et seq.*, require that the prosecution be instituted only by the written accusation of the Committee on Grievances of the North Carolina State Bar Association, accompanied by written affidavit of the person making a charge specified in the act, the accusation to be submitted to the solicitor who shall draw it up citing the accused to appear, and where the solicitor does so upon the written accusation of the Grievance Committee he may not add thereto other charges of misconduct, and where the accused is acquitted by a jury of the accusation of the Grievance Committee he may not be convicted of charges added by the solicitor, and is entitled to his discharge as to all counts.

STACY, C. J., dissenting.

THIS was a disbarment proceeding, tried by *Clement, J.*, at Fall Term, 1930, of MECKLENBURG.

On 5 March, 1930, the Grievance Committee of the North Carolina State Bar Association filed an accusation against the respondent, a duly licensed attorney, engaged in the practice of law in the city of Charlotte. The accusation was based upon C. S., 207. Attached to the accusation was the affidavit of S. J. Biggers wherein it was set forth that the said Strickland "did solicit from affiant certain professional business; that affiant then had a claim in the nature of personal damage or injury to his little girl, and that the said attorney did approach affiant without any request on the part of affiant and did then and there request affiant to allow him to represent affiant as attorney in the said matter for hire." Thereupon, the solicitor of the Fourteenth Judicial District prepared an accusation and citation which was duly served upon the respondent. The said accusation charged that the said attorney had solicited professional business from S. J. Biggers and eleven other persons named in the instrument. Thereupon the presiding judge issued an order to the respondent to appear and answer said charges. On 29 March, the accused appeared in open court and moved to strike out the names of all persons from the accusation except the name of S. J. Biggers. Said motion was overruled, and thereupon the respondent moved to nonsuit and quash all counts set out in the accusation of the solicitor except the count relating to transactions with S. J. Biggers. These motions were overruled and the respondent excepted. Thereupon the respondent asked that a bill of particulars be furnished by the solicitor. This request was granted, and the bill of particulars furnished by the solicitor contained the names of twelve persons, including S. J. Biggers, Pete Fellos and D. J. May. The accused filed an answer denying all the allegations set out in the accusation of the Grievance Committee and of the solicitor. Other motions were made by the said attorney and were all overruled by the trial judge.

The cause came on for trial upon the following issues:

1. "Did the respondent, H. L. Strickland, while engaged as a licensed attorney, solicit professional business from Pete Fellos, as alleged?"

2. "Did the respondent, H. L. Strickland, while engaged as a licensed attorney, solicit professional business from S. J. Biggers, as alleged?"

3. "Did the respondent, H. L. Strickland, while engaged as a licensed attorney, solicit professional business from D. J. May, as alleged?"

The jury answered the first issue "Yes"; the second issue "No," the third issue "No," and recommended mercy.

Thereupon, a judgment was entered disbarring the respondent and forbidding him to practice law in any court or before any judge, justice, board, commission or other public authority, from which judgment the respondent appealed.

F. R. McNinch, W. C. Davis, P. C. Whitlock and N. A. Townsend for North Carolina State Bar Association.

T. L. Kirkpatrick, B. G. Watkins and E. R. Preston for respondent.

BROGDEN, J. There are two methods by which an attorney may be disbarred:

1. By the exercise of inherent power of the courts in the orderly administration of public justice. This method may be characterized as the judicial method.

2. The statutory method prescribed by C. S., 208, *et seq.*

The first method was set up *In the Matter of Ebbs,* 150 N. C., 44, wherein it is written: "We do not entertain any doubt that, in the absence of restrictive legislation, the courts have an inherent power to strike from their rolls names of attorneys who are found by reason of their conduct unfit and unworthy members." See, also, *S. v. Johnson,* 171 N. C., 799; *McLean v. Johnson,* 174 N. C., 345. In the case at bar an addendum to the record discloses that on 18 July, 1929, Judge Thomas J. Shaw, while holding the courts for Mecklenburg County, issued an order appointing three members of the Charlotte bar as commissioners to investigate the conduct of the respondent, H. L. Strickland. However, the record does not disclose that any proceedings were had in pursuance of said order. Hence, the only question involved is whether the respondent was disbarred in accordance with the statutory method.

What, then, is the statutory method? C. S., 204, provides in substance that no attorney may be deprived of his right to practice law except upon two conditions: (a) "For a cause set forth in this chapter"; (b) "according to the provisions thereof." The "provisions thereof" prescribe in sections C. S., 208, *et seq.,* that the proceeding for disbarment (1) "shall be instituted and prosecuted only by the Committee on Grievances of the North Carolina State Bar Association"; (2) upon a written accusation "accompanied by the written affidavit of any person or persons who make charges against said attorney," etc.; (3) such accusation to be delivered to the solicitor who "shall draw up such accusation citing the accused to appear," etc.

An examination of the foregoing provisions of the statute leads to the conclusion that the solicitor is not authorized to "draw up such accusation" upon his own initiative or according to his own notion. It is not his accusation, but the accusation of the Committee on Grievances of the North Carolina State Bar Association. Consequently, he has no statutory power to add to it or subtract from it. The accusation of the Grievance Committee consists of three essential elements, viz.: (a) It must be properly signed; (b) duly attested; (c) and accompanied by sufficient affidavit. The affidavit is in the nature of a statutory bill of particulars attached to the accusation of the Grievance Committee.

Discussing the effect of a bill of particulars, *Stacy, C. J.,* wrote in *S. v. Wadford,* 194 N. C., 336: "When once ordered and furnished, the bill of particulars becomes a part of the record and serves (1) to inform the defendant of the specific occurrences intended to be investigated on the trial, and (2) to regulate the course of the evidence by limiting it to the items and transactions stated in the particulars." The only affidavit attached to the accusation of the Grievance Committee was signed and verified by S. J. Biggers, setting forth that the accused had solicited from him certain professional business. Therefore, the solicitor was without authority to drive afield and sweep into the case a multitude of transactions that so far as the record discloses had never been considered by the Grievance Committee of the North Carolina State Bar

Association, more especially, when the respondent had been afforded no opportunity to face his accusers before the Grievance Committee, which is the tribunal created by law to hear the charges in the first instance.

The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein. *Mfg. Co. v. Commissioners,* 189 N. C., 99; *Mfg. Co. v. Commissioners of Pender County,* 196 N. C., 744; *First National Bank v. Weld,* 264 U. S., 450; *Gorham v. Mfg. Co.,* 266 U. S., 265.

Manifestly, the trial of the cause exceeded the bounds of the statute and the motions made by respondent to nonsuit and quash all charges except those set forth in the affidavit of Biggers should have been granted, and the failure to do so by the trial judge is error.

It appears from the record that the respondent was acquitted upon the charge preferred by Biggers, and it necessarily follows that the judgment disbarring him from the practice of his profession was erroneously entered, and the defendant should be discharged.

Reversed.

STACY, C. J., dissenting: Stripped of all redundance, the case is simply one of "substance" versus "form," with the hands of the clock turned backward for a decision.

The respondent is a lawyer. On 18 July, 1929, the Superior Court of Mecklenburg County, Hon. Thos. J. Shaw, judge presiding, ordered an investigation into his conduct. C. S., 208. On 5 March, 1930, the Committee on Grievances of the North Carolina State Bar Association formulated an accusation and delivered it to the solicitor of the district, alleging that the said H. L. Strickland, while engaged as a licensed attorney in the city of Charlotte, "did by himself and through others solicit professional business from time to time and from divers persons," etc. C. S., 209. Thereupon, the solicitor drew up an accusation and motion for disbarment, or suspension, and duly cited the accused to appear and answer as provided by C. S., 210. In his citation the solicitor named Pete Fellos, among others, as one of the persons importuned by the respondent. Many technical objections were interposed and overruled before the hearing. Finally a bill of particulars was requested. In this the respondent, *inter alia,* was, for the second time, specifically charged with soliciting business from Pete Fellos in violation of C. S., 207. The verdict, induced by ample evidence, sustains this particular accusation. There is no question about the violation of the statute.

The respondent challenges the validity of the proceeding, purely civil in its nature *(In re Ebbs,* 150 N. C., 44, 63 S. E., 190), solely upon the attenuate ground that the name of Pete Fellos, *ipsissimis verbis,* nowhere appears in the accusation as formulated by the Grievance Committee of the Bar Association. *And he wins!* Has not "substance" again been sacrificed to "form," or "form" been exalted over "substance?" The majority says not. I disagree.

The General Assembly never intended that a gossamery question of procedure, such as here presented, should be held wholly sacrosanct in disbarment proceedings, and less so in other cases. Even in criminal prosecutions, where, for obvious reasons, matters of procedure are required to be observed with greater particularity than in civil actions, bills and warrants are no longer subject to quashal "by reason of any informality or refinement," C. S., 4623, and judgments are not to be stayed or reversed for nonessential or minor defects. C. S., 4625. Many cases have been upheld in the face of far more grievous defects than the one here alleged. *S. v. Beal,* 199 N. C., 278; *Jenette v. Hovey,* 182 N. C., 30. The modern tendency is against technical objections which do not affect the merits of the case. *S. v. Hardee,* 192 N. C., 533.

Nor was it the purpose of the Legislature to require an affidavit from the persons solicited to make the statute operative or effective. But this is what the present decision does. The quotation, "accompanied by the written affidavit of any person or persons who make charges against said attorney," stops short of the words, "if any," as used in the statute.

The order of Judge Shaw, which is a part of the record proper, being an order in the cause, is given no effect because, it is said, "the record does not disclose that any proceedings were had in pursuance of said order." Pete Fellos testified: "I went before the Grievance Committee, which consisted of Mr. Henry Fisher." This was the commission appointed by Judge Shaw under C. S., 208, as amended by chapter 287, Public Laws, 1929. Whether the solicitor gained his information from this source or the name of Pete Fellos was included in the accusation of the Grievance Committee of the Bar Association under the appellation of "divers persons," can make no difference so far as the merits are concerned.

But even if the alleged procedural irregularity, seized upon by the respondent, be conceded, the capital importance of which is denied, what has become of the inherent, as well as the statutory, power of amendment in the Superior Court in civil actions or special proceedings? C. S., 547; *Casualty Co. v. Green, ante,* 535; *Gilchrist v. Kitchen,* 86 N. C., 20.

The case turns on a *Lilliputian* point made *Brobdingnagian.* That is all there is in it. Why debate it further? *Cui bono?*

J. R. CLARK, TRADING AS J. R. CLARK MOTOR COMPANY, v. HOOD SYSTEM INDUSTRIAL BANK OF REIDSVILLE, NORTH CAROLINA.

(Filed 15 April, 1931.)

Usury C a—Complaint in this action to recover statutory penalty for usury held insufficient and demurrer was properly allowed.

A complaint in an action to recover twice the amount of an usurious rate of interest is demurrable if there is no allegation that such interest had been actually paid, and in this case held that allegations that defendant charged and received usury on a note discounted by plaintiff with defendant is insufficient to sustain the action for the statutory penalty.

APPEAL by plaintiff from *Finley, J.*, at November Term, 1930, of ROCKINGHAM. Affirmed.

This is an action to recover the statutory penalty for usury paid by plaintiff to defendant, to wit, twice the amount of interest paid on loans of money made by defendant to plaintiff.

The action was heard on defendant's demurrer to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action.

From judgment sustaining the demurrer, and allowing plaintiff time within which to amend his complaint, plaintiff appealed to the Supreme Court.

P. T. Stiers for plaintiff.

Manly, Hendren & Womble and Brown & Trotter for defendant.

PER CURIAM. In the absence of allegations in the complaint that plaintiff paid to defendant as interest on loans of money made by defendant to plaintiff, sums in excess of six per centum per annum, the demurrer of defendant to the complaint was properly sustained. Allegations that defendant charged and received usury, on notes discounted by plaintiff with defendant, are not sufficient to constitute a cause of action on which plaintiff is entitled to recover the statutory penalty for usury paid by plaintiff to defendant. Nor are allegations that defendant charged plaintiff interest in excess of six per cent on loans of money made by defendant to plaintiff, sufficient, without the further allegation that plaintiff has paid to defendant such interest.

The statutory penalty for charging usury is the forfeiture of all interest on the loan; it is only when the borrower has paid usury to the lender of money, that he can recover in a civil action as the statutory penalty for taking and receiving usury, twice the amount paid. C. S., 2306. *McNeill v. Suggs,* 199 N. C., 477, 154 S. E., 720; *Briggs v.*

Bank, 197 N. C., 120, 147 S. E., 815; *McKinney v. Sutphin,* 196 N. C., 318, 145 S. E., 621; *Pratt v. Mortgage Co.,* 196 N. C., 294, 145 S. E., 396; *Ripple v. Mortgage Co.,* 193 N. C., 422, 137 S. E., 156; *Sloan v. Insurance Co.,* 189 N. C., 690, 128 S. E., 2; *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334.

It is significant that in the instant case plaintiff did not amend his complaint as he was allowed to do by the judgment, and thus cure the specific defect therein to which his attention was directed by the demurrer. The judgment is

Affirmed.

IN THE MATTER OF THE MORTGAGE FORECLOSURE, EXECUTED BY CLARENCE JERNIGAN AND WIFE, SALLIE JERNIGAN, TO RUPERT W. JERNIGAN, AND DULY ASSIGNED TO THE BANK OF BEAUFORT.

(Filed 15 April, 1931.)

Mortgages H o—Assignee of mortgagee is entitled to commissions upon repeated resale of lands under foreclosure.

The allowance to be made a mortgagee as his commissions for several times selling the lands under advance bids is governed by the principle announced in *In re Hollowell Land,* 194 N. C., 222, where the lands were foreclosed by a trustee in a deed of trust.

CIVIL ACTION, before *Barnhill, J.,* at October Term, 1930, of DUPLIN.

On 22 January, 1926, Clarence Jernigan and wife executed and delivered to Rupert W. Jernigan a note for $1,500, and as security therefor executed and delivered a mortgage on certain real estate in Duplin County. On the same day the note was duly assigned to the Bank of Beaufort. Thereafter, on 17 March, 1930, the Bank of Beaufort advertised the property and sold it under power contained in the mortgage. The property was resold three or four times, and was finally sold for the price of $2,525. The Bank of Beaufort filed a petition with the clerk "for a just allowance of time, labor, services and expenses to be taxed as costs in the foreclosure of the said mortgage." The clerk declined to allow any costs except for newspaper advertisement and fee for filing the account of sale. The petitioner appealed to the judge of the Superior Court, who found, as a fact, that the property had been sold five times, and that as a result thereof the mortgagee had incurred "a great deal of extra expense, time, labor and services in making the resales." Thereupon, it was adjudged that the petitioner be allowed five per cent commissions "on amount of debts in addition to court costs in the cause, to be taxed as a part of the costs of sale of said property," etc.

From the foregoing judgment Sallie Jernigan, administratrix of Clarence Jernigan, mortgagor, appealed.

Gavin & Johnson for appellant.
C. R. Wheatley for petitioner.

PER CURIAM. The judgment rendered is directly authorized by *In re Hollowell Land,* 194 N. C., 222. The fact that the sale was made by a mortgagee rather than a trustee in a deed of trust does not prevent the application of the principle of law declared in the *Hollowell case, supra.*
Affirmed.

THE MORRIS PLAN INDUSTRIAL BANK v. C. V. HOWELL.

(Filed 22 April, 1931.)

1. **Bills and Notes G c—Upon plea of payment to drawer as agent of purchaser, evidence of agreement therefor between them held competent.**

   Where the plaintiff bank, the purchaser of a draft, brings action against the acceptor thereof, and the acceptor pleads payment to the drawer as the duly authorized collecting agent of the bank, evidence that the bank and the drawer had entered into an agreement providing that the bank would purchase, from time to time, drafts of the drawer accepted by its customers, and that the drawer would collect the money from its customers and account to the bank therefor, *is held* competent as tending to establish the fact of agency relied on by the defendant.

2. **Principal and Agent A d—Agency is presumed to continue in absence of anything to show revocation.**

   The appointment of an authorized agent to act in behalf of a principal will be presumed to continue in the absence of anything to show revocation.

3. **Bills and Notes G c—Upon plea of payment to drawer as agent of purchaser, evidence of prior collections by drawer as agent held competent.**

   Where the plaintiff bank, the purchaser of a draft, brings action thereon against the acceptor thereof, and the acceptor pleads payment to the drawer as the authorized collecting agent of the bank, evidence that pursuant to an agreement between them the drawer had for many years regularly collected money from its customers on drafts accepted by them and purchased by the plaintiff, and had accounted to the bank therefor, is held competent as tending to establish the fact of agency, and that the agency was in force at the time of the payment by the defendant to the drawer.

4. Same—Records and conduct of bank held competent as tending to show ratification of employee's statement that bank was looking to drawer.

A bank purchased an accepted draft from a dealer in automobiles given in part payment of the purchase price of an automobile by its customer, and in an action by the bank thereon there was evidence that an employee of the bank, after ascertaining from the drawer that the acceptor had paid him, told the acceptor that the bank would look to the drawer for payment: *Held*, entries on the books of the bank subject to inspection by its officers and directors showing that all payments on the draft after the date of the statement by the employee were paid by the drawer, and after that date the bank made no more demands upon the acceptor until the insolvency of the drawer, are competent as tending to show ratification by the bank of the statement of its employee.

APPEAL by defendant from *Stack, J.*, at September Term, 1930, of FORSYTH. Reversed.

This action to recover of the defendant on a negotiable instrument, in the form of a draft on which defendant was liable as an acceptor, was begun and tried in the Forsyth County Court before Efird, J., and a jury.

The defendant admitted his liability to the plaintiff on the draft, by reason of its acceptance by him, and of its negotiation, for value and before maturity, to the plaintiff by the drawer; he alleged in his answer, however, that he had paid the full amount of the draft to the drawer as agent of the plaintiff, the holder thereof, and that he was thereby discharged of his liability on the draft.

The facts shown at the trial are as follows:

On 2 March, 1929, the Lindsay Fishel Buick Company drew a draft on the defendant payable to its order on 2 March, 1930. The amount of the draft was $1,348. The draft was duly accepted by the defendant, and thereafter, for value and before maturity, was duly negotiated to the plaintiff by the Lindsay Fishel Buick Company.

The consideration for defendant's acceptance of the draft was the balance due by him on the purchase price of an automobile which he had purchased from the Lindsay Fishel Buick Company. This balance was payable, under the contract of sale, in monthly installments, the first installment being due and payable on 1 April, 1929.

The installment due and payable on 1 April, 1929, was paid by the defendant to the plaintiff as the holder of the draft. This payment was credited by plaintiff on the draft. Before the next installment was due and payable, the defendant traded the automobile which he had purchased from the Lindsay Fishel Buick Company, and received therefor another automobile and a check for $525. The check was delivered to and collected by the Lindsay Fishel Buick Company. A few days thereafter, the defendant sold the automobile which he had received in the trade, and received therefor a check for $650. This check was also delivered to and collected by the Lindsay Fishel Buick Company. Both checks were delivered to said company by defendant as payments on the draft, which had been accepted by defendant and which was then held by the plaintiff. The balance due on the amount of the draft was paid by defendant to said company prior to 1 May, 1929. At the time these payments were made the Lindsay Fishel Buick Company informed the defendant that it would account to the plaintiff, as holder of the draft, and thereby procure the release of the automobile which it had sold to defendant and which defendant had traded, from the lien for the balance due on the purchase price at the date of the sale. All these transactions between the defendant and the Lindsay Fishel Buick Company were had prior to 1 May, 1929.

On or about 1 May, 1929, in response to a notice from plaintiff that the second installment on the purchase price of the automobile sold to him by the Lindsay Fishel Buick Company, was due and payable to plaintiff, as holder of the draft, defendant went to the office of the plaintiff, and there informed a clerk in plaintiff's employment, who had charge of the collection of notes and drafts owned by plaintiff, that he had paid the full amount due on the draft to the Lindsay Fishel Buick Company. The said clerk, in the presence of the defendant, called the office of the Lindsay Fishel Buick Company, on the telephone, and after a conversation with the secretary and treasurer of said company, said to the defendant: "That is all right, Mr. Howell. We will look to the Buick Company for the payment."

No other or further demand was made by the plaintiff on the defendant for payment of monthly installments on the purchase price of the automobile, or for payments on the draft, until after the appointment of a receiver of the Lindsay Fishel Buick Company, because of the insolvency of said company. From the date of the notice to plaintiff by the defendant, that defendant had paid the full amount of the draft to the Lindsay Fishel Buick Company prior to 1 May, 1929, to the date of the appointment of a receiver of said company, the Lindsay Fishel Buick Company paid the monthly installments due on the purchase price of the automobile, which it had sold to the defendant, to the plaintiff, as the same became due and payable. These payments were accepted by the plaintiff, and applied as credits on the draft. Entries on the books of the plaintiff made by its clerks, and subject to the inspection of its officers and directors, showed that these monthly payments were made by the Lindsay Fishel Buick Company and not by the defendant. After the application of the payment made by the defendant on 1 April, 1929, and of all monthly payments made thereafter by the Lindsay Fishel Buick Company, on the purchase price of the automobile, as credits on the amount of the draft, the balance due thereon at the commencement of this action was $560.45.

The Lindsay Fishel Buick Company had been a depositor and customer of the plaintiff bank since some time during the year 1924 or 1925. There was evidence tending to show that when the account was opened between plaintiff and the said company, there was an agreement between them that the plaintiff would purchase from time to time notes executed and drafts accepted by the customers of the company, and that the company would collect from its customers amounts due on said notes and drafts, and account to plaintiff for all amounts collected; and that subsequent to said agreement, and pursuant thereto, plaintiff and said company had many transactions by which plaintiff purchased notes and drafts from said company, and said company collected and accounted to plaintiff for money collected from its customers on said notes and drafts. There was evidence tending to show that the draft sued on in this action was purchased and the money paid by defendant on said draft was collected by the Lindsay Fishel Buick Company pursuant to said agreement.

The issues submitted to the jury were answered as follows:

"1. Was the Lindsay Fishel Buick Company the agent of the plaintiff bank, with authority to receive for it the payments as alleged in the answer? Answer: Yes.

2. Did the plaintiff ratify and accept the payments made to the Lindsay Fishel Buick Company in its behalf by the defendant as alleged in the answer? Answer: Yes.

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: Nothing."

From judgment that plaintiff recover nothing of the defendant by this action, plaintiff appealed to the judge of the Superior Court of Forsyth County, assigning errors in the trial of the action in the Forsyth County Court.

At the hearing of the appeal by the judge of the Superior Court, plaintiff's assignments of error were sustained, and judgment was entered remanding the action to the Forsyth County Court for a new trial. From this judgment defendant appealed to the Supreme Court.

Ratcliff, Hudson & Ferrell for plaintiff.
Parish & Deal for defendant.

Connor, J. On its appeal from the judgment of the Forsyth County Court to the judge holding the Superior Court of Forsyth County, plaintiff assigned as errors in the trial of the action in the County Court, the admission, over its objections, of evidence tending to show (1) that there was an agreement in force at the time defendant paid to the

Lindsay Fishel Buick Company sums of money as payments on the draft sued on in this action, between the plaintiff and said company, by which said company was authorized by plaintiff to collect said sums of money, as agent of the plaintiff; (2) that prior to the payment of said sums of money to the said company by the defendant, the Lindsay Fishel Buick Company had collected from its customers money due on notes and drafts which the said company had sold to plaintiff, and had accounted to plaintiff for said money; and (3) that an employee of plaintiff had said to defendant that plaintiff would look to the Lindsay Fishel Buick Company for the payment of the draft on which defendant was liable to plaintiff by reason of its acceptance by him and its negotiation to plaintiff by the drawer.

These assignments of error were sustained by the judge. Defendant on his appeal to this Court from the judgment remanding the action to the Forsyth County Court for a new trial, contends that the judgment should be reversed, for error in sustaining plaintiff's assignments of error. This contention is sustained.

The evidence offered by defendant at the trial of the action in the Forsyth County Court, in support of his contention that the first and second issues submitted to the jury should be answered in the affirmative, was properly admitted.

An agency when shown to have existed will be presumed to have continued, in the absence of anything to show its revocation. 21 R. C. L., 822. There was no evidence tending to show that the agency resulting from the agreement between the president of the plaintiff bank and the Lindsay Fishel Buick Company, made in 1924 or 1925, with respect to the collection by said company of notes and drafts purchased by the plaintiff from said company, had been revoked. There was evidence of many transactions between the plaintiff and said company, subsequent to 1924 or 1925, and continuing to the date of the payment by defendant of the sums of money to the Lindsay Fishel Buick Company, by reason of and pursuant to said agreement. This evidence was admissible as tending to show that the agreement by which the Lindsay Fishel Buick Company was authorized to collect money for the plaintiff as its agent, was in force at the time defendant made the payments to said company on account of the draft sued on in this action.

The evidence tending to show that the Lindsay Fishel Buick Company had for many years regularly collected money from its customers as payments on notes and drafts which the said company had sold to the plaintiff, and had accounted to plaintiff for said money, was properly admitted as tending to show, as defendant contended, that the Lindsay Fishel Buick Company was the agent of plaintiff with authority to collect the money paid to said company by the defendant. *Buckner v. C. I. T. Corp.,* 198 N. C., 698, 153 S. E., 254.

The entries on the books of the plaintiff, made by its clerks and bookkeepers, and subject to the inspection of its officers and directors, showing that all payments made to plaintiff on account of the draft sued on in this action, after 1 April, 1929, were made by the Lindsay Fishel Buick Company, together with the fact shown by all the evidence that after 1 May, 1929, the plaintiff made no demand on defendant for the payment of the monthly installments on the purchase price of the automobile, tended to show that plaintiff knew that its employee had told defendant that plaintiff would look to the Buick Company for the payment of the draft, and that defendant was relying upon this statement and this conduct of the plaintiff as a ratification by the plaintiff of the action of its agent, the Lindsay Fishel Buick Company in accepting from defendant payment in full of the amount of the draft.

The evidence submitted to the jury at the trial in the county court was amply sufficient to sustain the allegations in the answer of the defendant, and to support the verdict on which the judgment of said court was rendered. We find no error in the trial, and the judgment should be affirmed.

This action is remanded to the Superior Court of Forsyth County, with direction that the judgment of the Forsyth County Court be affirmed. The judgment remanding the action to the county court for a new trial is

Reversed.

W. W. BULLUCK v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 22 April, 1931.)

1. **Insurance R c—Ability to do odd jobs of comparatively trifling nature will not preclude recovery under disability clause.**

In order for an insured to recover upon a disability clause in a policy of life insurance requiring that the insured be rendered incapable of following "a gainful occupation" in order to be entitled to payments thereunder, the insured must show more than inability to follow his usual avocation, and must show incapacity to follow any calling for which he is physically and mentally qualified, but ability to do odd jobs of comparatively trifling nature will not preclude recovery, and the question of whether the insured has suffered such total disability is for the jury.

2. **Same—Expert testimony that claimant's disease would not result in total disability held not conclusive.**

Testimony of experts in an action to recover upon a disability clause in a life insurance policy that the disease with which the plaintiff was suffering would not result in total disability is not conclusive on the question of whether the plaintiff was able to follow a gainful occupation, and where there is evidence in behalf of the plaintiff that he was totally and permanently rendered incapable of engaging in gainful occupation the conflicting evidence is properly submitted to the jury under correct instructions from the court.

CIVIL ACTION, before *Cranmer, J.,* at November Term, 1930, of EDGECOMBE.

The plaintiff alleged and offered evidence tending to show that the defendant issued and delivered to him two policies of life insurance, to wit, No. 3805892 and No. 3826994. The first policy was issued on 13 April, 1927, and the second policy on 14 June, 1927. It was admitted by the parties that all premiums had been paid on both of said policies and that proofs of claim in due form had been filed with defendant. The policies provided for certain benefits in the event of total and permanent disability before age 60. The pertinent clause is section 3 and is as follows: "Total Disability: Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation. Permanent Disability: Total disability shall, during its continuance, be presumed to be permanent; (a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the insured; or, (b) If such disability has existed continuously for ninety days."

In the spring of 1928 the plaintiff suffered an attack of psoriasis. The medical testimony was to the effect that this disease "is a chronic inflammatory condition of the skin with dried-in scales that look like mica. It has a tendency to appear on the back of the arms and on the front of the legs. Characteristically it gets better in summer and worse in winter. Itching is usually present, but in a light form." The physicians further testified that they had never seen a patient suffering with this disease get entirely well.

Plaintiff testified that the disease had destroyed one toe nail and that it prevented him from sleeping. He said: "If you ever had your lips split open from cold weather, that is exactly how it feels. If the temperature is just right at night, I will go ahead and sleep all right. . . . I have to get up and change my temperature at night, use some salve and take a bath. Last night I got up half dozen times or more. . . . I have lost twenty pounds since spring. . . . I have not undertaken to run a farm since 1928. Prior to that time I did actual work when necessary. . . . I couldn't do any kind of work—am not physically able—couldn't hold out. I can drive an automobile a little while, but wouldn't undertake to drive from here to Raleigh. When I get jaded, it looks like everybody is going to run into me. . . . I am unable to clerk in a store on account of my feet and toe nails. . . . I don't know of any work or gainful occupation that I could follow. . . . My hair has started to come out. . . . When I scratch blood comes like a fly bite. . . . I have not farmed any since as I have been unable. . . . I know of no work I could do in my present physical and mental condition." Plaintiff offered other testimony tending to show that he was physically unable to engage in a gainful occupation.

There was evidence to the effect that the plaintiff assisted in selling Dust Down for boll weevils in the summer of 1929. Plaintiff testified, "I have earned less than $150 since the last day of March, 1929."

Two physicians, admitted to be medical experts, testified that in their opinion "psoriasis does not result in rendering a man unfit to carry on any gainful occupation." One of the physicians stated that "at times it would make any gainful occupation physically painful."

The following issues were submitted to the jury:

1. "Has the plaintiff had any impairment of mind or body which continuously renders it impossible for him to follow a gainful occupation?"

2. "If so, is such disability permanent as defined in the policy?"

The jury answered both issues "Yes," and judgment was entered upon the verdict, from which judgment the defendant appealed.

The defendant in its brief states that the only question involved is "whether the plaintiff is entitled to receive the benefits under the terms of the policy?" "If so, the amount of the judgment is correct."

T. T. Thorne and J. W. Grissom for plaintiff.

Pou & Pou, Gilliam & Bond and Connor & Hill for defendant.

Frederick L. Allen, General Counsel Mutual Life Insurance Company of New York, of counsel.

BROGDEN, J. Five recent decisions of this Court discuss the liability of insurance companies to the assured resulting from permanent disability to engage in a "gainful occupation," to wit: *Buckner v. Ins. Co.*, 172 N. C., 762; *Lee v. Ins. Co.*, 188 N. C., 538; *Fields v. Assurance Co.*, 195 N. C., 262; *Brinson v. Ins. Co.*, 195 N. C., 332; *Metts v. Ins. Co.*, 198 N. C., 197. The *Buckner case, supra,* declared: "The authorities are practically unanimous that under the terms of this policy plaintiff cannot recover without showing a bodily injury that will incapacitate him not only from following his usual avocation of fireman, but also from pursuing any other gainful occupation. The language is too plain and the meaning too unmistakable to permit an enlargement of the terms of the contract by construction. It is unfortunate for the plaintiff, but "it is so nominated in the bond." The defendant relies upon the *Buckner case*.

There is a sharp divergence among courts and text-writers in regard to the construction of clauses in insurance policies dealing with such total or permanent disability as to render it impossible "for the insured to follow a gainful occupation." This divergence has produced two schools of thought upon the subject. The first school of thought adheres to a strict construction of such contracts, and the second school maintains a liberal construction thereof. The view of the liberal constructionist is well stated by the Missouri Court in *Foglesong v. Modern Brotherhood,* 97 S. W., 240. The pertinent clause in the policy of insurance under discussion provided for indemnity for "permanent and total disability . . . which renders him unable to carry on or conduct any vocation or calling." The Court said: "Common knowledge of the occupations in the lives of men and women teaches us that there is scarcely any kind of disability that prevents them from following some vocation or other, except in cases of complete mental intertia. We have examples of persons without hearing and without sight following a vocation—some without feet, and some without hands, engaged in business. The achievements of disabled persons are seemingly marvelous. Under defendant's theory, the plaintiff might embark in the peanut trade or follow the business of selling shoestrings or lead pencils, or follow some similar calling; in which instances, under the rule invoked, there would be no disability within the meaning of the policy. In our opinion, such was not within the contemplation of the parties."

North Carolina has been classified in the decisions of various courts as adhering to the strictest construction of such contracts. This classification has resulted from the decision in *Buckner v. Ins. Co.,* 172 N. C., 762, which has been cited in many jurisdictions. 24 A. L. R., 203; 37 A. L. R., 151; 41 A. L. R., 1376; 51 A. L. R., 1048; *McCutchen v. Pacific Mutual Life Ins. Co.,* 151 S. E., 67.

The *Buckner case* was distinguished in the *Brinson case, supra,* in which latter case the Court said: "That in addition to his bodily injuries, resulting directly from the accident, plaintiff has suffered and is now suffering from a disease, which incapacitates him from pursuing not only his occupation as a farmer, but also any other gainful occupation, in which effort, either physical or mental is required."

None of the cited cases undertake to define the expression "gainful occupation." The Supreme Court of Minnesota, in *Carson v. N. Y. Life Ins. Co.,* 203 N. W., 209, discussed liability under a policy providing indemnity when the insured "has become wholly disabled by bodily injury or disease so as he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatever for remuneration or profit." Construing the meaning of the words used the Court said: "It must mean any occupation similar to that in which he had ordinarily been engaged or for which he may be capable of fitting himself within a reasonable time. If the disability prevents the insured from performing the essential parts of such an occupation with substantial continuity, it should entitle to the income payment promised." The Texas Court in *Great Southern Life Ins. Co. v. Johnson*, 25 Southwestern (2d), 1093, considered a policy of insurance providing indemnity if the disability resulted from bodily injury or disease "so that he is and will be thereby permanently, continuously and wholly prevented from performing any work for compensation or profit or from following any gainful occupation." The Court said: "The term 'gainful occupation' is likewise a relative one; the insured's occupation and earning capacity at the time the policy issued was in contemplation of the parties—what would be a 'gainful occupation' for one may not be such for another. A prosperous merchant with a constantly expanding business, earning large and continually increasing profits, who because of injuries received is totally disabled from continuing that business, and it becomes bankrupt as a result, certainly cannot be said to pursue a 'gainful occupation,' compared to the other, if he is fortunate enough to earn something, though out of all proportion to what he had previously earned." *Fagerlie v. N. Y. Life Ins. Co.*, 278 Pac., 104; Cooley's Briefs on Insurance, Vol. 6, 5533, *et seq.;* Couch—Cyclopædia of Insurance Law, Vol. 7, section 1686, *et seq.*

The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it "impossible to follow a gainful occupation."

The physicians both testified that in their opinion the disease from which plaintiff suffered would not result in permanent disability, and the defendant insists that, as the disease is uncommon, the nature and course of the malady lies exclusively in the field of expert and scientific knowledge. Hence, the testimony of the physicians should be accepted as conclusive upon such technical subject. Undoubtedly, this view of the law, in proper cases, would perhaps be sound and maintainable, but in the case at bar the paramount question was whether the plaintiff was able to engage in a gainful occupation. The ability of a party to perform physical or mental labor is not a question of such exclusively technical significance as to permit expert testimony to be given conclusive effect. Indeed, the identical question arose in *Fields* *v. Assurance Co., supra,* in which the physician had testified that the plaintiff was not in his opinion permanently disabled. Moreover, there was a conflict between the testimony of physicians and the plaintiff with respect to permanent disability, and it has been the uniform policy of the law of this State, for many years, to submit conflicting evidence to the jury upon the theory that in the last analysis the jury is the weigh-master of the evidence.

No error.

W. T. WHITSETT ET AL. v. D. P. CLAPP ET AL.

(Filed 22 April, 1931.)

1. **Charities A c—Charity will not be declared void because for benefit of indefinite class where its purposes are sufficiently defined.**

A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. N. C. Code of 1927, secs. 4033-4035.

2. **Wills E f—Gift in trust for charitable purposes held not void for indefiniteness.**

Devises of property in trust to individual trustees by name for the purpose of "keeping up preaching" in a designated church and in churches of weak financial condition, and for "home missionary work" are held not to be void for indefiniteness, the purposes of the devises being sufficiently described and the trustees named therein being trustees of a religious organization whose duties relate to distribution of such funds.

APPEAL by the heirs-at-law or residuary devisees of D. P. Foust, testator, from *Schenck, J.,* at August Civil Term, 1930, of GUILFORD.

The testator died 20 July, 1911, leaving a will containing the following items:

Item 4th. I give and devise the sum of $300 annually to be paid to the trustees of Springwood Church for the purpose of keeping up preaching in said church, the money to be paid from the rent of my houses in Greensboro, N. C., the remainder of the rent of said houses after paying all taxes and all other expenses in keeping up houses, etc., shall be paid to the trustees of Orange Presbytery of the Presbyterian Church for the purpose of keeping up preaching in weak churches.

Item 5th. I give and devise all my notes, railroad stock and bank stock (not otherwise to be used as set forth above) the interest dividends shall be collected annually, and after paying all taxes and other expenses the remainder of the interest dividends shall be paid to the trustees of Orange Presbytery of the Presbyterian Church to be used for Home Missionary work none of the principal shall be used only the dividends and the interest.

Item 6th. I give and devise my home tract of land of about 400 acres with all the building household and kitchen furniture, etc. to Margret I. Greeson to have and to hold to her use during her natural life provided she remains with us during our life at her death said lands etc. shall be rented out year by year for cash and after paying all taxes etc. the balance of the proceeds shall be paid to the Trustees of Orange Presbytery for the purpose of keeping up preaching in weak churches.

Item 8th. My will and desire is that the land known as the William Boon place of 198 acres shall be rented year by year for cash after paying taxes and all other expenses the surplus (if any) shall be paid to the Trustees of Orange Presbytery for home missionary work.

Mrs. Foust died 29 March, 1919, and Miss Margaret Greeson, a devisee in Item 6 of the will, died 24 November, 1921.

The plaintiffs qualified as executors on 27 July, 1911, and between 29 March, 1919, and 18 July, 1928, paid for the benefit of Orange Presbytery $15,275.24. Some of the buildings referred to in these items were located in a section of the city of Greensboro occupied by colored people and were condemned by the city. By reason of these and other circumstances, the plaintiffs applied to the court for a construction of the will to enable them to discharge the duties imposed upon them by the testator. Upon the pleadings and admissions of parties, Judge Schenck held:

1. That the testator, D. P. Foust, intended that the lands and part of his estate referred to in Items 4, 5, 6, and 8 of his last will and testament, and the income therefrom, be separately regarded.

2. That the beneficiaries, the trustees of Springwood Church and of Orange Presbytery, are known, fixed and definite parties, and the causes for which income from said lands and other property is to be expended are definitely designated in said last will and testament.

3. That the defendants, heirs at law of said D. P. Foust, have no interest in said property, or the income arising therefrom.

4. That under said last will and testament of said D. P. Foust, the plaintiffs, W. T. Whitsett and D. P. Clapp, are created trustees of an express trust, with full power and authority to execute the same by collecting all the rents, income and profits from the property referred to in said items 4, 5, 6, and 8 of the said last will and testament, and after the payment of taxes lawfully assessed and other expenses, including keeping up the property as directed in said will, the said trustees shall, from the income derived from the property described in item 4 of said will, pay to the trustees of Springwood Church the sum of $300

annually, and the remainder of the income from the property described in said item 4, and the income from the properties described in items 5, 6, and 8, shall be paid to the trustees of Orange Presbytery, to be used by them for the uses and purposes directed in said will.

5. That said plaintiffs, executors, and trustees, as aforesaid, are authorized, empowered and directed to do all other things necessary to preserve the estate entrusted to them, and in carrying out the trust imposed upon them under said last will and testament of said D. P. Foust.

Judgment accordingly and appeal by the residuary legatees.

Frazier & Frazier for plaintiffs.
King, Sapp & King for Trustees of Orange Presbytery.
H. O. Koontz and Coulter & Cooper for appellants.

ADAMS, J. The validity of the testator's direction for the support of Springwood Church is not doubted, but the items providing for "home missionary work" and for "keeping up preaching in weak churches" are assailed by the appellants for the alleged reason that no beneficiaries are named who are capable of claiming the trust estate. The plaintiffs allege that the provisions of the will are indefinite and uncertain, and the appellants seem to treat the allegation as equivalent to an admission that the devises are void; but the plaintiffs further allege that the testator's intent was to vest title to the property in themselves as executors and trustees for the purposes declared in the will, and that for the guidance of the interested parties a judicial construction of the will was essential. The question is whether the devises in aid of home missionary work and the maintenance of weak churches in Orange Presbytery are void for uncertainty.

In the legal sense a charity has been defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons. *Barden v. R. R.*, 152 N. C., 318. It was said in *Griffin v. Graham,* 8 N. C., 96, that there is no principle of law which forbids the appropriation of property to charitable uses since the power of alienation was introduced and that a devise to individual trustees by name for any lawful purpose has been deemed valid since the statute of wills without regard to the statute of 43 Elizabeth; and in *Keith v. Scales,* 124 N. C., 497, it was noted that the validity of charitable devises does not depend upon the question whether the latter statute is or is not in force in this State. The subject must be considered in connection with sections 4033-4035(c) and 3568-3572 of the Code of 1927. The trust created by the will in question is within the definition of a charity and should not be set aside merely because it was created for the benefit of an indefinite class. Trusts for public charity "may, and indeed must be for an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." *Russell v. Allen,* 107 U. S., 163, 27 Law Ed., 397.

In the case before us the trial court held that the executors are trustees of an express trust with power to collect rent, income, and profits, and to do whatever may be necessary to preserve the estate and execute the trust. The trustees of Springwood Church and of Orange Presbytery are beneficiaries with capacity to invoke the equitable jurisdiction of the courts, as are also the members of a board or department whose duty it is to raise funds for home mission work and the support of weak churches—churches whose maintenance is dependent upon financial aid. We are therefore of opinion that the trusts created by the will are not void, but are sufficiently definite to be enforced. Many of the authorities discussing the question have been collected in recent opinions of this Court and need not be reviewed at this time. *Benevolent Society v. Orrell,* 195 N. C., 405; *Holton v. Elliott,* 193 N. C., 708; *Trust Co. v. Ogburn,* 181 N. C., 324; *Chandler v. Board of Education, ibid.,* 444; *Keith v. Scales, supra.* That this conclusion conforms to our legislative policy is shown by a statute, recently enacted, which provides that no gift, grant, bequest, or devise, whether in trust or otherwise, to religious, educational, charitable, or benevolent uses shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust. Public Laws 1925, ch. 264, sec. 1; N. C. Code, 1927, sec. 4035(a). It may be noted that the bequests in *Thomas v. Clay,* 187 N. C., 778, and *Weaver v. Kirby,* 186 N. C., 387, are distinguishable from trusts created by the will in controversy. Judgment

Affirmed.

W. H. EDGERTON, ADMINISTRATOR OF ESTATE OF N. S. PERKINS, v. K. D. PERKINS.

(Filed 22 April, 1931.)

1. **Evidence I b—Bank ledger sheet identified as original and made in ordinary course of business held admissible in evidence.**

   In an action by the administrator of the deceased father against the son for the accounting by the latter of an advancement alleged to have been made, a bank ledger sheet identified as the original and testified by the cashier as to a relevant entry made in the ordinary course of business of the bank and produced from the bank files at the trial, is competent.

2. **Wills F c—Definition of advancement.**

An advancement by a father to his son is a gift *in præsenti* or provision made by the father on behalf of his son for the purpose of advancing him in life and enabling him to anticipate his inheritance to that extent.

3. **Appeal and Error E h—Supreme Court will interprete record in light of theory of trial in lower court.**

Where neither party makes objection to the issue submitted, the Supreme Court on appeal will interpret the record in the light of the theory prevailing in the trial court.

CIVIL ACTION, before *Johnson, Special Judge,* at August Term, 1930, of WAYNE.

The defendant is the son of N. S. Perkins, deceased, and the plaintiff, administrator of said deceased, instituted this action for an accounting, alleging that the defendant had received $10,000 proceeds of liberty bonds belonging to plaintiff's intestate, and that said proceeds constituted an advancement to the defendant from the estate of his father. The defendant filed an answer admitting that N. S. Perkins was the owner of liberty bonds, but denying that he was indebted to the estate of his father in any amount whatsoever.

The evidence tended to show that on 20 November, 1919, the defendant, K. D. Perkins, deposited with the cashier of the Wayne National Bank $10,000 worth of liberty loan bonds to be registered in the name of N. S. Perkins. In November, 1928, the bonds were sold and the proceeds credited in the bank to the account of defendant, K. D. Perkins. The proceeds of sale amounted to $8,625. The ledger sheet of the bank was produced and identified by the cashier and vice-president, and this document showed an entry of $8,625 to the account of defendant. There was other evidence tending to show that the defendant in an examination before the clerk disclosed that he had not repaid to his father any money after the time of the deposit.

The defendant did not testify in his own behalf, and the case was submitted to the jury upon the following issue:

"Did the plaintiff's intestate, N. S. Perkins, make the defendant an advancement in the sum of $8,625 as alleged in the complaint?"

The jury answered the issue "Yes."

Whereupon, judgment was entered upon the verdict decreeing that the defendant should account for said sum with interest thereon in determining the portion of his share of his father's estate.

From judgment so rendered the defendant appealed.

Kenneth C. Royall, D. H. Bland, N. W. Outlaw and Andrew C. McIntosh for plaintiff.

J. Faison Thomson for defendant.

BROGDEN, J. The exception to the introduction of the ledger sheet of the bank cannot be sustained. The document was identified as the original ledger leaf, and that it had been made in the ordinary course of business in the bank and was produced at the trial from the files of the bank by the cashier and vice-president thereof. *Peebles v. Idol,* 198 N. C., 56. "An advancement may be defined as a gift *in præsenti* or provision made by a parent on behalf of a child for the purpose of advancing said child in life, and thus to enable him to anticipate his inheritance to the extent of such advancement." *Paschal v. Paschal,* 197 N. C., 40; *Nobles v. Davenport,* 183 N. C., 207.

The charge to the jury correctly interpreted and applied the principles of law established by the decisions. Moreover, there was no objection to the issue, and thus both parties consented to the trial of the cause upon the theory of an advancement, and hence this Court will interpret the record in the light of the theory prevailing in the trial court. *Shipp v. Stage Lines,* 192 N. C., 475; *In re Will of Efird,* 195 N. C., 76.

No error.

P. O. LEWIS AND ADELAIDE LEWIS v. W. J. MITCHELL, ADMINISTRATOR OF W. L. MITCHELL, DECEASED.

(Filed 22 April, 1931.)

1. **Evidence D b—Where administrator introduces evidence of transaction with decedent adversary party may introduce evidence of such transaction.**

   An administrator of a deceased person "opens the door" to the plaintiff in an action against the estate to introduce evidence of personal transactions and communications by eliciting such evidence beforehand on the trial.

2. **Same — Testimony of disinterested witnesses as to declarations of decedent held competent.**

   Testimony of declarations of a decedent as to certain of his desires in regard to the distribution of his property, relevant to the issue, is competent when testified to by witnesses not interested in the result of the trial when such testimony is otherwise competent.

3. **Wills B b—Evidence of value of land held competent on question of value of services rendered decedent in action on contract to convey.**

   In an action against the estate of the decedent to recover for services rendered upon the promise of the decedent to devise his lands in compensation, testimony as to the value of the lands *is held* competent upon the question of the value of the services rendered decedent.

CIVIL ACTION, before *Sinclair, J.,* at October Term, 1930, of HERTFORD.

The plaintiffs are husband and wife and brought this action against the administrator of W. L. Mitchell, alleging that in August, 1920, the said W. L. Mitchell, deceased, requested plaintiffs to leave their home at Goldsboro, North Carolina, and move to his farm in Hertford County, cultivate, clear and improve said farm and take care of said intestate, with the understanding that the said intestate would make a will, leaving his property to plaintiffs at his death. Plaintiffs further allege that, relying upon said promise, they moved to the home of the defendant's intestate, cultivated the farm, erected permanent improvements thereon, and cared for said intestate until his death. It was further alleged that no will was made and consequently plaintiffs have not been compensated for services rendered.

The administrator filed an answer denying the material allegations of the complaint and further alleging that the deceased, W. L. Mitchell, paid the plaintiffs for his board, and that they were merely tenants on the farm.

The verdict of the jury established a contract between the plaintiffs and the deceased Mitchell, as alleged in the complaint, and awarded $500 to the male plaintiff for services and $2,000 to the *feme* plaintiff.

From judgment upon the verdict the defendant appealed.

Alvin J. Eley for plaintiffs.
W. W. Rogers and J. C. Cherry for defendant.

BROGDEN, J. The defendant "opened the door" with respect to the evidence relating to personal transactions with the deceased. Consequently the exceptions upon this phase of the case cannot be sustained. *Sumner v. Candler,* 92 N. C., 634; *Pope v. Pope,* 176 N. C., 283; *Walston v. Coppersmith,* 197 N. C., 407.

The defendant also excepted to certain conversations that third parties had with the deceased to the effect that he wanted the *feme* plaintiff to have his property. The record does not disclose that any of these witnesses had a pecuniary interest in the result of the action. "Exclusion does not apply when witness has no interest in the result of the action." *R. R. v. Hegwood,* 198 N. C., 309; *Conley v. Cabe,* 198 N. C., 298.

Exceptions were also taken to certain testimony relating to the value of the land. This evidence was competent upon the question of the value of services rendered by the plaintiffs to defendant's intestate.

Indeed, a careful examination of all the exceptions does not disclose reversible error, and the judgment is affirmed.

No error.

EWELL C. PARRISH v. ARMOUR & COMPANY, EMPLOYER, AND WESTERN CASUALTY COMPANY, INSURER.

(Filed 22 April, 1931.)

1. **Master and Servant F b—Evidence that injury was sustained in accident in course of employment held sufficient.**

   Where, in a hearing under the Workmen's Compensation Act, the evidence tends to show that the employee was a salesman and collector, and was furnished an automobile by the employer, that there were no prescribed hours of work, and that after supper the employee left his home to meet a business appointment, and that in order to buy some cigars, chewing tobacco, etc., he regarded as expedient to the purpose of his business visit, he deviated some 3,500 feet to a drug store, and was injured in a collision while going from the drug store to the place of business of the customer, is held sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment.

2. **Master and Servant F i—Findings of fact of Industrial Commission are conclusive when supported by evidence.**

   The findings of fact of the Industrial Commission in hearings before it under the Workmen's Compensation Act are conclusive upon the courts when supported by competent evidence.

3. **Master and Servant F h—Evidence that employee sustained permanent injury held sufficient to sustain award therefor.**

   Evidence that an employee, sustaining an injury compensable under the Workmen's Compensation Act, suffered permanent loss of hearing in one ear as the result of the accident, is held sufficient to sustain an award of the Industrial Commission for permanent damages therefor under the act.

STACY, C. J., dissenting.

APPEAL by defendants from *Frizzelle, J.*, at February Term, 1931, of DURHAM. Affirmed.

Plaintiff in this case, a salesman, was injured as the result of a collision of the automobile he was driving with that of another car, said accident occurring at the intersection of B and Broad streets, Durham, North Carolina. As a result of this accident he suffered a fractured skull, broken nose and other injuries. The defendants deny liability, contending that the accident did not arise out of and in the course of his employment.

The matter was heard before J. Dewey Dorsett, Commissioner, on 2 June, 1930. Upon the facts found by him and the conclusions of law, award was rendered in favor of plaintiff. Upon the entering of the award of J. Dewey Dorsett, Commissioner, the Commission caused formal notice thereof to be served on all parties on 14 June, 1930. The defendants duly appealed to the full Commission on 17 June, 1930, notice of which was given all parties on 24 June, 1930. The Commission, pursuant to notice, reviewed the proceedings of Commissioner J. Dewey Dorsett, in Raleigh, on 5 July, 1930, and at the hearing before the full Commission it affirmed the award of J. Dewey Dorsett, Commissioner.

On 8 August, 1930, the Commission duly notified all parties of the confirmation of the award of J. Dewey Dorsett, Commissioner. The defendants gave notice of appeal to the Superior Court of Durham County. The record was thereupon duly certified and filed in the office of the Superior Court of Durham County, and the case docketed.

The cause came regularly on to be heard before his Honor, J. Paul Frizelle. The matter was heard upon the assignment of errors, and the court entered judgment at the February Term of Superior Court, 1931, as follows: "This cause coming on to be heard before the undersigned judge presiding in the Tenth Judicial District on appeal from award made to plaintiff in the above-entitled action by the Industrial Commission, and being heard, and after hearing the argument of counsel for plaintiff and defendant: It is ordered, considered and adjudged and decreed, that the award made in said action by said Industrial Commission be, and the same is hereby approved, and the judgment entered in said action by said Industrial Commission be, and the same is hereby affirmed. It is further ordered that the costs of this appeal be taxed against the defendant."

The evidence of plaintiff tended to show that he was injured at the intersection of Broad and B streets, in the city of Durham, about 7 o'clock, on the evening of 20 February, 1930. At the time of the injury he was employed as a salesman for Armour & Company, and had been in the employment of the defendant, Armour & Company, for about four and one-half years. He acted in the capacity of salesman and collector. That the defendant, Armour & Company, furnished plaintiff with a Ford coupe automobile which he kept in his garage at his home on Duke Street. It had been his custom to store the company's car in his garage since his employment began. That it had been his custom to make trips after business hours in the interest of his employer, and that as a matter of fact he had no regular hours, but it was a rule to begin work about seven o'clock in the morning and sometimes he would get back at three o'clock in the afternoon and sometimes it would be eight or ten o'clock in the evening; that he had no regular hours for the reason that he worked until his duties were performed. That he lived on the west side of Duke Street. Paschall's Bakery is also located on the west side of Duke Street. About six o'clock in the evening, 20 February, 1930, plaintiff had called M. J. Paschall about some shortening that had been left at his bakery and made an engagement to see him at his bakery in the evening. That he went by the bakery about six o'clock, but found a number of customers in the bakery, after which he went directly home and ate supper with the intention of returning to the bakery as soon as supper was over; that he knew Mr. Paschall did not leave his bakery before seven-thirty. That he left home at seven-thirty for the bakery, but found he had no cigars, cigarettes or chewing tobacco in his pocket, and started in the direction of the University Pharmacy on Broad Street. Plaintiff's automobile was headed north on Duke Street and on the west side of said street. In order to reach the pharmacy he drove in a northerly direction to Green Street, followed Green Street westward two blocks until he reached Watts Street. After reaching Watts Street he turned north on Watts and traveled about thirty feet until he reached B Street. He then drove along B Street in a westerly direction about seven city blocks to Broad Street, at which point the collision between an automobile driven by another person and the one driven by plaintiff took place.

It was in evidence that at the time of the collision plaintiff sustained severe and permanent injuries. His nose was broken, his skull fractured and his collar bone broken. He had a "Y" shaped fracture running from his ear to the base of the skull on the left side. Plaintiff was injured on 20 February, was confined to Watts Hospital thirty-one days, and did not return to his work until 12 May, 1930.

The full Commission found:

"1. The parties to this proceeding are bound by the provisions of the Compensation Act of 1929, the Western Casualty Company, an intervening party defendant, is the insurance company.

2. The plaintiff was a regular employee of the defendant, and on the evening of 20 February, 1930, suffered an accident that arose out of and in the course of his employment. (Exception by defendants.)

3. At the time of the accident the average weekly wage earned by the plaintiff was in excess of $30.00.

4. As a result of the accident the plaintiff has been totally disabled from 20 February, 1930, to 2 May, 1930, on which later day he returned to work in the same capacity and at the same salary, although not physically able to return to work.

5. As a result of the accident the plaintiff has suffered a most serious facial disfigurement causing facial paralysis sustained as a result of the accident.

6. As a result of the accident the plaintiff has sustained complete loss of hearing of his left ear. (Exception by defendants.)

7. The facial paralysis suffered by the plaintiff and the complete loss of hearing of the left ear is a permanent condition.

8. That the plaintiff, on the night of the occurrence of the accidental injury, would not have deviated but approximately 3,500 feet from the

most direct route from his home to Paschall's Bakery, his destination, had not his contemplated trip been interrupted by the accident.

9. That the defendant, Armour & Company, had at no time either on this occasion, or any other time, authorized the plaintiff to give to customers or prospective customers, cigars, cigarettes, chewing tobacco or similar articles, nor had the plaintiff ever been reimbursed by defendants, Armour & Company, for any expenditures made for any such articles."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary assignments of error and other material facts will be considered in the opinion.

Fuller, Reade & Fuller and Forrest A. Pollard for plaintiff.
McLendon & Hedrick for defendants.

CLARKSON, J. *The first question involved:* Did the accident resulting in the injury to Ewell C. Parrish, the plaintiff, arise out of and in the course of his employment? We think so.

Public Laws 1929, ch. 120, known as the North Carolina Workmen's Compensation Act, sec. 2(f), is as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except where it results naturally and unavoidably from the accident."

In *Davis v. Veneer Corp., ante,* at p. 265-6, the law is stated: "In order that compensation may be due the injury must arise out of and also be received in the course of the employment—neither alone is enough. It is not easy . . . to give comprehensive definition of these words . . . an injury received, in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of the employment' when there is . . . a causal connection between the conditions under which the work is required to be done and the resulting injury. . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation, . . . then it 'arises out of the employment.' The causative danger must be peculiar to the work and not common to the neighborhood." *Chief Justice Rugg* in *McNichol's case,* 102 N. E., 697 (Mass.), N. C. Industrial Commission Report, 131. Similar definition occurs in the case of *Wirta v. North Butte Mining Co.,* 210 Pac., 332, 30 A. L. R., 964, in these words: "The words 'in the course of an employment' refer to the time, place, and circumstances under which the accident took place, and an accident arises 'in the course of the employment' if it occurs while the employee is doing the duty which he is employed to perform."

The plaintiff was a salesman for defendant, Armour & Company. His duties were to sell their products and collect for them. Paschall's Bakery was a customer and there was "some mix-up he had on shortening." Paschall and plaintiff had an engagement to meet to straighten the matter out the evening plaintiff was injured. Plaintiff went to Paschall's place of business about 6 o'clock, but he was busy with customers. Plaintiff drove home, ate his supper and on his way back to meet the engagement with Paschall, he deviated about 3,500 feet to go by the University Pharmacy, where he ran an account, to purchase some cigars, etc., as he was out of them, and that was the closest way to get them on his way to meet his appointment. He was injured as a result of a collision in going the round about way.

Plaintiff testified, in part: "On the night of the injury I was in the company's automobile. It was a Ford coupe. I keep the car in the garage at my home on Duke Street. That had been my custom ever since my employment. It was the custom to make trips after business hours in the interest of my employer. I do not know what you mean by hours—we never know hours. There is a rule among ourselves that we get there about seven in the morning and sometimes we get there at three in the afternoon and sometimes eight and ten in the evening. I work until my duties are performed. . . . I have been working for Armour & Company four and one-half years. I have no hours of work. I work until I perform my duties of the day. When the accident occurred I had not reached the drug store. I was going the most direct route to the drug store to get the cigars, at the time of the injury. Q. Was it ever customary for you salesmen to carry cigars for the convenience of your prospective customers. A. It is. Yes, Mr. Dorsett, I can't say for the others, but it is a custom of mine to always have cigars, cigarettes and chewing tobacco. Q. When you left your home that evening did you leave for the purpose of going to Paschall's Bakery or the drug store? A. To the bakery. Q. And it was a mere incident that you went to the drug store? A. Yes, sir. Had it not been for the bakery I would not have gone to the drug store. . . . I would not have gone by the drug store but for the fact that I was going to Paschall's Bakery that night. My ultimate objective was to go to the bakery."

In *Duncan v. Overton,* 182 N. C., at p. 82, is the following: "The father having placed his son in charge of the machine to bring it from Nashville to the A. and E. College at Raleigh, and thence to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by an accidental divergence in discharging the duty entrusted to him before the driver reached the garage, such as is testified to in this case." *Jeffrey v. Mfg. Co.,* 197 N. C., 724.

"Plaintiff's deceased was employed during the nighttime at a produce commission house. He had begun work at midnight, and, at about 4 a.m., together with a customer to whom he had been talking, regarding some products which he wished to buy, he crossed the street to go to a restaurant for a cup of coffee, as was the custom among employees. He was struck by a motor truck, and died as a result of his injuries. Affirming an award, the Court held that crossing the street to get a cup of coffee did not constitute an abandonment of the employment under the circumstances, and that deceased's injuries arose out of and in the course of his employment. *Clark v. Voorhees,* 194 N. Y. App. Div., 13, 184 N. Y. Sup., 888 (1920). The case of *Rainford v. Chicago City Ry. Co.,* 289 Ill., 124 N. E., 643 (1919), affirming 213 Ill. App., 648 (1919), was an action at law against an employer to recover damages for personal injuries. The principal question in the case, however, was whether the accident arose out of and in the course of the plaintiff's employment within the meaning of the compensation act. The facts were as follows: Plaintiff was a conductor in the employ of the defendant. His run ordinarily terminated at a point where there was a restaurant and where there was a stopover of a few minutes that he might procure lunch. On the occasion in question his run had been extended to a point where there was no lunch room at the lunch period. However, the car passed in close proximity to his home at an intermediate point, and he requested the motorman to stop at his home that he might order lunch prepared so that he could pick it up on his return trip and eat it at the end of the run. When the car stopped, as requested by him, he started to cross the adjacent track and was struck by a car while thereon and injured. Affirming a judgment of the appellate court which had sustained a judgment of the Superior Court in plaintiff's favor, the Court held that the accident arose out of and in the course of plaintiff's employment, saying: 'That which is reasonably necessary to the health and comfort of an employee, although personal to him, is incidental to the employment and service. . . . It cannot be doubted that it was reasonably necessary and incidental to his employment that the plaintiff should have his lunch at the time and place allowed by the defendant for that purpose, and if it was reasonably necessary and proper for him to attempt to make the arrangement he did, then, as a matter of law, the injury did arise out of and in the course of his employment." 20 Negligence Compensation Cases (Anno.), at pp. 559-560.

The plaintiff was on duty for Armour & Company, when he left his home to see the customer, and the deviation for the cigars, etc., we do not think such as would bar his recovery under the liberal construction generally given by this and other courts to the Workmen's Compensation Act. We think plaintiff's injury was "by accident arising out of and in the course of the employment." When plaintiff left home he was on duty for his employer, and the deviation was incidental to his employment.

In *D'Aleria v. Shirey,* 286 Fed. Rep., at p. 525, we find: "If a servant, while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable," citing numerous authorities. *Jones v. Weigand,* 134 Appellate Div. of N. Y. Reports, 654; *Bryan v. Bunis,* 208 Appellate Div. of N. Y. Reports, 389; *Taylor v. Hogan Milling Co.,* 129 Kan., 370, 66 A. L. R., 752.

Speaking to the subject in Pollock on Torts, 6th ed., at p. 84, we find: "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct."

We think the above author analyzes the matter clearly and succinctly. The decisions are in conflict in the different jurisdictions.

In *Williams v. Thompson, ante,* at p. 465, we find: "The findings of fact by the Industrial Commission in a hearing before them is conclusive upon appeal when there is sufficient competent evidence to sustain the award. *Southern v. Cotton Mills, ante,* 165."

This exception and assignment of error by the defendants cannot be sustained.

The second question: Was there any evidence to support the finding by the Commissioner to the effect that the claimant sustained a complete loss of hearing in the left ear? We think so.

Public Laws 1929, ch. 120, sec. 30(s), is as follows: "For the complete loss of hearing in one ear, sixty per centum of average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of average weekly wages during one hundred and fifty weeks."

The Commission found "As a result of the accident the plaintiff has sustained complete loss of hearing of his left ear."

Without reviewing it, as the evidence is heretofore set forth, we think that there was sufficient competent evidence to sustain this finding of fact; that being the case, the finding is binding on us. Public Laws 1929, ch. 120, *supra,* sec. 60, in part is as follows: "The award of the Commission, as provided in section fifty-eight, if not reviewed in due time, or an award of the Commission upon such review, as provided in section fifty-nine, shall be conclusive and binding as to all questions of fact," etc.

We do not think this exception and assignment of error by the defendants can be sustained.

From a careful review of the case, the judgment of the court below is Affirmed.

STACY, C. J., dissenting: Tested by the standard, "arising out of and in the course of the employment," as interpreted by a majority of the courts, plaintiff's injury, in my opinion, is not compensable under the North Carolina Workmen's Compensation Act. *Davis v. Veneer Corp., ante,* 263.

In *Lipinski v. Sutton Sales Co.,* 220 Mich., 647, 190 N. W., 705, a salesman returning from lunch with employer's automobile was denied compensation for injury sustained while going off route to pick up a friend. And in *California Casualty Indemnity Exchange v. Industrial Accident Commission,* 213 Pac., 257, a driver making deliveries over specified route was injured while returning to truck from cigar store: *Held,* that the accident did not arise out of and in the course of his employment, or from any act incidental to it.

Perhaps the strongest authority, favoring compensation, is *Solar-Sturges Mfg. Co. v. Industrial Commission,* 315 Ill., 352, where it was held (as stated in the first head-note): "An injury to a manufacturing company salesman who was struck by a street car while going to call on a customer arises out of and in the course of his employment although at the time of the injury the salesman was crossing the street on his return from a store where he purchased cigars to be used when making his calls, which the company allowed as a part of his expense account."

The two cases are distinguishable, however, by reason of the fact that the salesman in the cited case was authorized to purchase cigars with the company's money for use in making his calls, while no such fact exists in the instant case. The contrary is made to appear.

MRS. R. H. CHEEK v. J. C. SQUIRES ET AL.

(Filed 22 April, 1931.)

1. **Mortgages H m—Deed of purchaser at foreclosure sale will not be declared void for failure of clerk to order trustee to make deed.**

The omission of the clerk to make an order to the trustee to give a deed to the purchaser at a foreclosure sale of a deed of trust is an irregularity in the foreclosure proceedings, but where the trustee has complied with the terms of the power of sale and has executed a deed to the purchaser, the purchaser's title will not be held void solely on that account, the duty of the clerk to make the order being purely ministerial. C. S., 2591.

2. **Same—Purchaser's title is not affected by trustee's failure to make entry on margin of record nor by his failure to file statement.**

The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of C. S., 2594(a) in entering upon the margin of the record in the office of the register of deeds the fact and date of foreclosure, the person to whom sold, etc., nor by the failure of the trustee to comply with C. S., 2594(b) requiring that he file in the clerk's office a statement of receipts and disbursements of all funds coming into his hands by reason of the sale, for although the failure of the trustee to perform these duties constitutes irregularity in the foreclosure proceedings, the performance of these duties not being required until after the sale, the failure to perform them cannot affect the title of the purchaser unless he has notice of fraud.

3. **Mortgages H m—Innocent purchaser for value without notice acquires good title unaffected by fraud in prior foreclosure sale.**

Where an officer of a real estate corporation acts for the corporation in foreclosing a deed of trust in which the corporation is trustee, and at the sale the land is bid in by an employee of the corporation who does not pay any part of the purchase price, and who afterwards transfers the land to another who gives a deed of trust to the corporation to secure the balance of the purchase price: *Held,* upon the foreclosure of the second deed of trust, the purchaser at the sale, being an innocent purchaser for value, acquires a good title unaffected by the fraud in the foreclosure of the first deed of trust and free from the claims of the *cestui que trust* therein: and, *held further,* knowledge of the fraud committed by the officer of the trustee corporation will not be imputed to another corporation lending money for the payment of part of the purchase price to the purchaser at the last sale, although the officer was also an officer of the lending corporation, the fraud being committed in the interests of the trustee corporation and against the interests of the lending corporation.

4. **Principal and Agent C c—Corporation held not to have imputed knowledge of fraud committed by its officer in interests of another corporation.**

Where an officer and director of one corporation deals with another corporation of which he is also an officer and director, knowledge of fraud committed by him in the interests of the former corporation will not be imputed to the latter corporation.

APPEAL by defendants, Frank A. Hayes and his wife, Blanche D. Hayes, and Alamance Home Builders Association, from *Grady, J.,* at September Term, 1930, of ALAMANCE. Reversed.

This is an action (1) to recover of the defendants, J. C. Squires and his wife, Lula N. Squires, the sum of $2,500, the amount of certain bonds executed by said defendants and owned by plaintiff at the date of the commencement of the action; (2) for judgment that plaintiff has a first lien on the land described in the complaint for the sum of $2,500, with interest thereon from 4 May, 1928, by virtue of a deed of trust executed by the said J. C. Squires and his wife, Lula N. Squires, to the defendant, Alamance Insurance and Real Estate Company, trustee, to secure the payment of said bonds; and (3) for judgment and decree that certain deeds and deeds of trust referred to in the complaint, under which the defendants, Blanche D. Hayes, wife of Frank A. Hayes, and Alamance Home Builders Association claim title to said land, upon facts alleged in the complaint, are null and void.

Under and by virtue of the deeds and deeds of trust alleged in the complaint to be null and void, the defendants, Blanche D. Hayes, and Alamance Home Builders, claim title to the land described in the complaint as against the plaintiff under a foreclosure of the deed of trust from J. C. Squires and his wife, Lula N. Squires, to the Alamance Insurance and Real Estate Company, trustee. The said defendants deny the allegations in the complaint on which the plaintiff contends that the foreclosure of said deed of trust was void. They allege that by virtue of said foreclosure and of the deeds and deeds of trust referred to in the complaint, they have a good title to said land, free from any lien thereon in favor of the plaintiff by virtue of the deed of trust by which the bonds owned by plaintiff were secured.

The action was heard on the report of the referee, to whom it had been referred for trial, by the judge holding the Superior Courts of Alamance County, at September Term, 1930. Plaintiff duly excepted to certain findings of fact and conclusions of law set out in said report. At the hearing the judge approved and confirmed the findings of fact, numbered 1 to 16, inclusive, which are substantially as follows:

On 4 May, 1923, the defendants, J. C. Squires and his wife, Lula N. Squires, for the purpose of securing the payment of certain bonds executed by said defendants, conveyed the land described in the complaint to the defendant, Alamance Insurance and Real Estate Company, trustee, by a deed of trust. This deed was duly recorded in Alamance County. Thereafter the plaintiff purchased five of the bonds secured by deed of trust, aggregating in amount the sum of $2,500. These bonds were dated 4 May, 1923, and were due and payable on 4 May, 1924.

It is provided in the deed of trust by which said bonds were secured, that upon default in their payment at maturity, the trustee, without being first called on to do so by the holder of said bonds, may sell the land described therein under the power of sale contained therein, and thereby foreclose the deed of trust.

Upon default in the payment of said bonds, the Alamance Insurance and Real Estate Company, trustee, without the knowledge of plaintiff, advertised the land described in the deed of trust for sale. After several sales, conducted in strict compliance with the terms of the power of sale contained therein, each sale being followed by an increased bid for said land, the said trustee sold said land on 24 July, 1925, to the defendant, G. C. Somers, who was the last and highest bidder at said sale. The several sales, and increased bids, were duly reported by the trustee to the clerk of the Superior Court of Alamance County. No order was made by said clerk of the Superior Court, confirming the sale of the land to the purchaser, G. C. Somers, or directing the trustee to convey the land to him, upon his payment to the trustee of the amount of his bid.

Pursuant to said sale, the Alamance Insurance and Real Estate Company, trustee, on 7 August, 1925, executed and delivered to the defendant, G. C. Somers, a deed by which the land described in the complaint was conveyed to him. At the date of said sale, and at the date of said deed, the said G. C. Somers, was an employee of the defendant, Alamance Insurance and Real Estate Company. He purchased the land at the sale on 24 July, 1925, at the request of the Alamance Insurance and Real Estate Company, but paid no money or other thing of value to said company, as trustee or otherwise, at the date of the execution and delivery to him of the deed. This deed was duly recorded in Alamance County, on 10 August, 1925. No entry was made on the record in the office of the register of deeds of Alamance County showing that the deed of trust from J. C. Squires and his wife, Lula N. Squires to Alamance Insurance and Real Estate Company, trustee, had been foreclosed by sale of the land described therein until 24 January, 1928, when such entry was made by an attorney for the Alamance Insurance and Real Estate Company.

On 8 August, 1925, at the request of the Alamance Insurance and Real Estate Company, the defendant, G. C. Somers, conveyed the land described in the complaint to the defendant, Frank A. Hayes, by deed which was duly recorded. The purchase price for said land was paid by the said Frank A. Hayes to the Alamance Insurance and Real Estate Company. The said purchase price was paid partly in money, and partly by bonds executed by the purchaser, and secured by deed of trust to the Alamance Insurance and Real Estate Company, executed by him and his wife. This deed of trust, which was duly recorded, was subsequently foreclosed by sale of the land described therein on 11 April, 1928. At this sale the defendant, Blanche D. Hayes, was the last and highest bidder for said land in the sum of $7,000. The Alamance Insurance and Real Estate Company, as trustee, conveyed the land described in the deed of trust to the defendant, Blanche D. Hayes, by deed which was duly recorded. She paid on the purchase price for said land the sum of $5,000, which was loaned to her by the defendant, Alamance Home Builders Association. This loan was secured by bonds executed by the defendants, Blanche D. Hayes and her husband, Frank A. Hayes, and by deed of trust by which the land was conveyed to the defendant, W. E. Sharpe, trustee. This deed of trust was duly recorded. The balance of the purchase price for the said land was paid by bonds in the sum of $2,000, executed by the defendants, Blanche D. Hayes and her husband, Frank A. Hayes, and secured by a deed of trust to the Alamance Insurance and Real Estate Company, which was recorded subsequent to the deed of trust to W. E. Sharpe, trustee.

The bonds executed by the defendants, Blanche D. Hayes and her husband, Frank A. Hayes, and payable to the defendant, Alamance Home Builders Association, are now past due, and unpaid.

The bonds executed by the defendants, J. C. Squires and his wife, Lula N. Squires, and now owned by the plaintiff, were due and payable on 4 May, 1924. They have not been paid. The interest on said bonds has been paid to 4 May, 1928.

The defendant, Alamance Insurance and Real Estate Company, the trustee in the deed of trust by which the bonds owned by plaintiff were secured, is now insolvent; the defendant, John M. Coble, has been appointed and is now acting as the receiver of said company.

At the date of the foreclosure of the deed of trust from J. C. Squires and his wife, Lula N. Squires, to the Alamance Insurance and Real Estate Company, trustee, by sale of the land described therein, to wit, 24 July, 1925, the defendant, W. E. Sharpe, was the vice-president and general manager of said company. As such officer of said company, the said W. E. Sharpe directed and controlled, for said company, as trustee, the said foreclosure, and the execution of the deed by which the land described in said deed of trust was conveyed to the defendant, G. C. Somers. He continued as vice-president and general manager of said company until the execution by said company as trustee of the deed for said land to the defendant, Blanche D. Hayes. He was acting as such officer at the date of the execution of the deed of trust from Blanche D. Hayes and her husband, Frank A. Hayes to him, as trustee, to secure the payment of the bonds for the sum of $5,000, payable to and now owned by the defendant, Alamance Home Builders Association. At the time the Alamance Insurance and Real Estate Company received from the defendants, Blanche D. Hayes and her husband, Frank D. Hayes, the proceeds of the loan made to them, to wit, the sum of $5,000, to be applied as a payment on the purchase price of the land conveyed to the defendant, Blanche D. Hayes, by the Alamance

Insurance and Real Estate Company, trustee, the said W. E. Sharpe was vice-president and general manager of the last named company. In all the transactions, with respect to the land described in the complaint, to which the Alamance Insurance and Real Estate Company was a party, beginning with the foreclosure of the deed of trust from J. C. Squires and his wife to said company as trustee, on 24 July, 1925, and ending with the receipt by said company of the proceeds of the loan made to the defendants, Blanche D. Hayes and her husband, by the defendant, Alamance Home Builders Association, on 11 April, 1928, the defendant, W. E. Sharpe, as its vice-president and general manager, represented and acted for the said Alamance Insurance and Real Estate Company.

At the date of the application by the defendants, Blanche D. Hayes and her husband, Frank A. Hayes, to the defendant, Alamance Home Builders Association, for a loan of the sum of $5,000, to be applied as a payment on the purchase price of the land sold to the said Blanche D. Hayes by the Alamance Insurance and Real Estate Company, as trustee, the defendant, W. E. Sharpe, was the secretary and general manager of the Alamance Home Builders Association. He was also a director of both the Alamance Insurance and Real Estate Company and of the Alamance Home Builders Association. The two corporations occupied the same offices, and were under the general control and management of the said W. E. Sharpe. Directors of one corporation were also directors of the other corporation. The application of the defendants, Blanche D. Hayes and Frank A. Hayes to the defendant, Alamance Home Builders Association was made upon the suggestion and upon the advice of the said W. E. Sharpe, who was at the date of said application, an officer of both the Alamance Home Builders Association and of the Alamance Insurance and Real Estate Company.

The application was first made for a loan of $7,000, the full amount of the purchase price of the land sold by the Alamance Insurance and Real Estate Company, trustee, to the defendant, Blanche D. Hayes. The application was referred to the loan and inspection committee of the defendant association. The amount of the loan applied for was reduced from $7,000 to $5,000, at the suggestion of the committee. The application for a loan of the larger amount was disapproved by the committee. The loan for the smaller amount was approved and was thereupon made. The bonds executed by the defendants, Blanche D. Hayes and her husband, Frank A. Hayes, for the sum of $5,000, were secured by a deed of trust on the land to the defendant, W. E. Sharpe, as trustee.

The foregoing are the facts found by the referee, as appears from his findings Nos. 1 to 16, inclusive.

Finding of fact No. 17, set out in the report of the referee, is as follows:

"17. That the defendants, Frank A. Hayes and Blanche D. Hayes in turn acquired title to said property without any actual knowledge of any irregularities in the title of their predecessors, and that the defendant, Alamance Home Builders Association, made the loan herein referred to without any actual knowledge of such irregularities."

On his finding of fact, the referee concluded that the irregularities shown on the record in the foreclosure of the deed of trust from J. C. Squires and wife, Lula N. Squires, to Alamance Insurance and Real Estate Company, trustee, by sale of the land described therein to C. G. Somers, did not invalidate said foreclosure, that the deed for said land to the defendant, G. C. Somers, was not void, for the reason that he was an employee of the Alamance Insurance and Real Estate Company, but at most was only voidable for that reason, and that the knowledge of G. E. Sharpe, as an officer of the Alamance Insurance and Real Estate Company, that the bonds owned by plaintiff had not been paid out of the proceeds of the sale of the land by the trustee, was not imputed to the Alamance Home Builders Association, by reason of the fact that said W. E. Sharpe was vice-president and general manager of the Alamance Insurance and Real Estate Company and also secretary and treasurer, and general manager of the Alamance Home Builders Association at the time the latter corporation made the loan to the defendants, Blanche D. Hayes and Frank A. Hayes, the proceeds of which were paid by them to the Alamance Insurance and Real Estate Company.

In accordance with his findings of fact and conclusions of law, set out in his report, the referee concluded "that judgment should be rendered in favor of the plaintiff and against the defendants, Lula N. Squires and John M. Coble, receiver as aforesaid, in the sum of $2,500, with interest from 4 May, 1928, until paid, at the rate of 6 per cent per annum, that the restraining order heretofore issued be dissolved, that the action be dismissed for lack of service as to the defendant, J. C. Squires, that the remaining defendants go without day and that the costs of the action be taxed against the plaintiff."

At the hearing by the judge of plaintiff's exceptions to the findings of fact and conclusions of law set out in the referee's report, the finding of fact No. 17 was disapproved in part, and upon the evidence offered the court found as a fact that the Alamance Home Builders Association, one of the defendants, had constructive notice of the irregularities and fraud practiced by W. E. Sharpe, in respect to the matters and things referred to in the complaint and in the findings by the referee; and the court further found as a fact and as a matter of law, that said

Alamance Home Builders Association is not an innocent purchaser of the notes made by Frank A. Hayes and wife, referred to in the fourteenth finding of fact, and secured by the deed of trust to W. E. Sharpe, trustee, as stated in the thirteenth finding of fact.

On the facts found by the referee and approved by the judge, as well as on the facts found by the judge upon his disapproval in part of finding No. 17, judgment was rendered that plaintiff recover of the defendants, J. C. Squires and his wife, Lula N. Squires, John M. Coble, receiver of the Alamance Insurance and Real Estate Company, and W. E. Sharpe, the sum of $2,500, with interest from 4 May, 1928, together with the costs of the action, and that plaintiff has a first lien on the land described in the complaint for the amount of said judgment. There was a decree that said land be sold by a commissioner, appointed by the court, and that the proceeds of said sale be applied first to the payment of plaintiff's judgment, and that the balance, if any, be paid to the defendant, Alamance Home Builders Association.

From this judgment and decree the defendants, Mrs. Blanche D. Hayes and her husband, Frank A. Hayes, and the Alamance Home Builders Association appealed to the Supreme Court.

E. A. Woltz, J. Dolph Long and Roberson & Abbott for plaintiff.
Cooper A. Hall, M. C. Terrell and J. A. Bailey for defendants.

CONNOR, J. The failure of the clerk of the Superior Court of Alamance County to make and enter on the records in his office an order directed to the Alamance Insurance and Real Estate Company, trustee, requiring said trustee to execute and deliver to the defendant, G. C. Somers, the purchaser at the final sale of the land described in the deed of trust from the defendants, J. C. Squires and his wife, Lula N. Squires, to said trustee, upon his compliance with his bid at said sale, was admittedly an irregularity appearing on the public records of Alamance County and affecting the title to the land described in the complaint. C. S., 2591. The order required by the statute is, however, merely ministerial in its nature, and its omission, when in fact the trustee has, after the expiration of ten days from the date of the sale, and after complying with all the terms of the power of sale contained in the deed of trust, made title to the purchaser, does not invalidate the foreclosure, or render the title acquired by the purchaser as grantee in the deed of the trustee void, solely for that reason. *Lawrence v. Beck,* 185 N. C., 196, 116 S. E., 424.

It is required by statute in this State that a trustee who has foreclosed a deed of trust by the exercise of the power of sale contained therein, shall enter on the margin of the record of the deed of trust in the office of the register of deeds, the fact of such foreclosure, and the date when, and the person to whom a conveyance was made of the land sold by the trustee by reason of the foreclosure. C. S., 2594(a). The trustee is also required by statute to file an account with the clerk of the Superior Court of the county in which the land lies, showing his receipt and disbursement of all funds which have come into his hands by reason of the sale of the land made by him under the power of sale. C. S., 2594(b). The failure of the trustee to comply with either of these statutes is an irregularity, but as there can be no compliance, until after the sale has been completed, and the purchase money paid to the trustee by the purchaser, such irregularity cannot ordinarily be held to affect the validity of the foreclosure, or to render the title acquired by the deed of the trustee void. The title of a subsequent purchaser of the land, claiming under a deed from the trustee to the purchaser at the foreclosure sale, who has paid value for the land, and who was without actual knowledge of any fraud on the part of the trustee, which would have invalidated the foreclosure, is not void, because such purchaser had constructive notice from the records that the clerk of the Superior Court had failed to perform a merely ministerial duty required by C. S., 2591, or that the trustee had failed to comply with the requirements of C. S., 2594(a) or of C. S., 2594(b). The irregularities in the instant case, as shown by the record, did not prejudice the plaintiff. *Wise v. Short,* 181 N. C., 320, 107 S. E., 134.

The fact found by the referee that neither Frank A. Hayes, nor his wife, Blanche D. Hayes, nor the defendant, Alamance Home Builders Association, had actual knowledge that the trustee had failed to pay the bonds owned by plaintiff out of the proceeds of the sale, was also found by the judge. Indeed there was no evidence to the contrary. The judge concluded as a matter of law that by reason of the relation of the defendant, W. E. Sharpe, to both the Alamance Insurance and Real Estate Company and the Alamance Home Builders Association, the knowledge of the said defendant, which he had acquired as an officer of the Alamance Insurance and Real Estate Company, was imputed to the Alamance Home Builders Association. No facts, however, were found upon which such knowledge was imputed either to Frank A. Hayes or to Blanche D. Hayes. The finding by the referee that both these defendants were purchasers for value, without notice that the trustee had failed to pay the bonds owned by plaintiff, was approved by the judge. It is, therefore, immaterial whether or not the Alamance Home Builders Association had notice, actual or constructive, of the fact that the bonds had not been paid. In *Phillips v. Lumber Co.,* 151 N. C., 519, 66 S. E., 603, it is said: "Besides, a purchaser for value from one whose deed was procured by fraud gets a good title if he has no notice of the fraud. *Odom v. Riddick,* 104 N. C., 515, 10 S. E., 609, and cases there cited. Even a purchaser with notice of the fraud from an innocent purchaser without notice gets a good title. *Glenn v. Bank,* 70 N. C., 205; *Fowler v. Poor,* 93 N. C., 466." This statement of the law by *Clark, C. J.,* is quoted and approved by *Clarkson, J.,* in *Duncan v. Gulley,* 199 N. C., 552, 155 S. E., 244.

The knowledge which the defendant, W. E. Sharpe, had of the fact that the Alamance Insurance and Real Estate Company, as trustee, had failed to pay the bonds secured by the deed of trust from J. C. Squires and his wife, Lula N. Squires, and owned by the plaintiff, was acquired by him while acting as an officer of said trustee. It was not acquired by him while acting as an officer of the Alamance Home Builders Association. This knowledge was therefore not imputed to the latter corporation. There was no finding of fact in the instant case by the referee or by the judge that the defendant, W. E. Sharpe, acted for or represented the latter corporation in considering the application for or in making the loan of $5,000 to the defendant, Blanche D. Hayes. As it was to the interest of the Alamance Insurance and Real Estate Company that the loan should be made, it is not to be presumed that W. E. Sharpe, acting for and representing said corporation, informed the Alamance Home Builders Association of any facts within his knowledge, which affected adversely the title of Blanche D. Hayes. The law applicable to this phase of the case has been stated as follows:

"When there are dealings between two corporations, or between a corporation and an individual through the intervention of a common officer or agent, the question whether the corporation is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation, or to the other party, depends upon the circumstances of each case; if under the circumstances it is his duty to communicate such knowledge, the corporation to which he owes such duty will be chargeable with his knowledge; but, of course, this does not apply to knowledge which he is under no duty to disclose, or which is in the nature of a confidential communication which he is not at liberty to disclose to the corporation; or where the common agent, while so acting, commits a fraud on one of the parties, in which case a knowledge of the fraud will not be imputed to the defrauded party, since it would be contrary to experience to presume that the defrauding agent would communicate it, although it may be imputed to the party who obtains the benefit of the fraud." 14a C. J., 491, sec. 2359(2).

As said by *Brown, J.,* in *Brite v. Penny,* 157 N. C., 110, 72 S. E., 964, this Court recognizes the doctrine held by all courts, that a corporation is not bound by the action or chargeable with the knowledge of its officers, with respect to a transaction, in which such officer is acting in his own behalf or in the behalf of another corporation of which he is also an officer. Only that knowledge which its officer acquires while acting in its behalf, and which it is his duty to communicate to it, is imputed by the law to a corporation.

The judgment in the instant case in so far as it is adjudged and decreed therein that plaintiff has a first lien on the land described in the complaint, to be first satisfied and discharged out of the proceeds of the sale of the land by the commissioner appointed therein, is reversed. The action is remanded to the Superior Court of Alamance County that judgment may be entered in accordance with the report of the referee and with this opinion.

Reversed.

STATE v. HOWARD COMBS AND HOFFMAN WELLS.

(Filed 29 April, 1931.)

1. **Criminal Law I f—Motion for consolidation of actions is addressed to discretion of trial court.**

   When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. C. S., 4622.

2. **Jury C a: Appeal and Error J e—Inadvertence in empaneling jury held not to constitute prejudicial error.**

   Where two defendants on trial for criminal offenses have been convicted by the jury which has been duly sworn, a mistake by the clerk in empaneling them, that they should "well and truly try the case between C. and W.," failing to say the action was by the State of North Carolina, will not alone be held for reversible error, it appearing that the trial proceeded without prejudice to the defendants.

3. **Evidence K c—Finding that witness is expert is conclusive when there is evidence supporting such finding.**

   The qualification of a witness to testify as an expert in finger prints is a preliminary matter for the court, and his finding that a witness is an expert is not reviewable on appeal when there is evidence to support his finding.

4. **Criminal Law G p—Finger print testimony by expert held competent, the probative force being for the jury.**

   It is competent for a witness who has qualified as an expert in finger prints to testify that finger prints found on a bottle at the place of the crime were identical with the finger prints taken of the defendant, the probative force of such testimony being for the jury.

APPEAL by defendants from *Quickel, J.,* at November Special Term, 1930, of SURRY. No error.

Two indictments pending in the Superior Court of Surry County were, on motion of the Solicitor for the State, consolidated for trial.

In each of said indictments, both the above-named defendants were charged with the commission of felonies, to wit, housebreaking (C. S., 4235), and larceny of property exceeding in value the sum of twenty dollars. (C. S., 4252.)

In one of said indictments it was alleged that on 22 May, 1930, the defendants broke into and entered a building in Surry County, and stole therefrom an automobile, the property of John Thomas, of the value of $200; in the other indictment, it was alleged that the defendants on the same day, to wit, 22 May, 1930, broke into and entered another building in Surry County, and stole therefrom certain articles of wearing apparel, to wit, men's suits and women's dresses, the property of D. E. Koontz, of the value of $100.

Neither of the defendants objected to the consolidation of the two indictments, at the time the order for such consolidation was made by the court. After the indictments had been consolidated, each defendant entered a plea of not guilty, and jurors were thereupon duly chosen and sworn to try the issue between the State and the defendants.

After the jurors were sworn, the clerk of the court addressed them as follows:

"Gentlemen of the jury, you have been sworn, and you are now empaneled to well and truly try this case between Hoffman Wells and Howard Combs. You will sit together, hear the evidence and render your verdict accordingly."

At the trial, the evidence introduced by the State tended to show that the crimes charged in the indictments had been committed as alleged therein. The evidence introduced by the defendants did not tend to show the contrary. The defendants denied that they had broken into or entered either of the buildings described in the indictments, and denied that they had stolen either the automobile or the wearing apparel. Their evidence tended to show that each of the defendants was at his home in the town of Mount Airy in bed and asleep at the time the crimes were committed.

John Thomas, a witness for the State, testified that during the night of 22 May, 1930, his automobile—a Chevrolet roadster—was stolen from Hawke's Garage, which is located in the rear of his home in the town of Mount Airy. The automobile was worth $250. It was returned to the witness the next day by police officers of the town of Mount Airy.

D. E. Koontz, a witness for the State, testified that during the night of 22 May, 1930, the building located in the town of Mount Airy, and occupied by the witness as proprietor of a pressing club, was entered through a window which faced on the street, and that several men's suits and women's dresses, of the value of $100, were stolen from the building. These articles of wearing apparel, which were the property of the witness, were returned to him the next day by police officers of the town of Mount Airy.

The defendants, each testifying as a witness in his own behalf, admitted that they were together during the afternoon preceding the night when the buildings were entered and the property stolen, in the vicinity of the building occupied by D. E. Koontz as a pressing club. They remained together during the evening until about 10 o'clock, when they separated, each going to his own home for the night.

A police officer of the town of Mount Airy testified that he was on duty, patrolling the streets of said town, during the night of 22 May, 1930. At about 2 o'clock a.m., this witness saw on the streets of said town a Chevrolet roadster, driven by the defendant, Howard Combs. There were two men in the roadster when the witness first saw it at a distance of 300 or 400 yards from Koontz's pressing club. The witness recognized one of these men, the driver, as the defendant, Howard Combs. He did not recognize the other man in the roadster, and did not undertake to identify the defendant, Hoffman Wells, as the companion at the time of the defendant, Howard Combs. The witness followed the roadster until it was driven out of town. When the driver of the roadster realized that the witness, an officer, was pursuing him, he drove the automobile off the road, and into a meadow. He stopped the automobile near a hay-stack. The two men, who were in the automobile when the witness first saw it on a street in the town of Mount Airy, jumped and ran, leaving the motor running and the lights burning. The witness pursued them through the meadow, but was unable to overtake them. Both men escaped. The grass in the meadow was wet with dew.

When the witness went to the automobile he found a number of men's suits and women's dresses in it. The next day the automobile was identified by John Thomas as his property. It was delivered to him by the police officers. The men's suits and women's dresses were identified by D. E. Koontz as his property. They were delivered to him by the police officers.

A witness for the State testified that he discovered the next day a track on the ground near the window in the building occupied by D. E. Koontz as a pressing club. There was evidence tending to show that this track was made by the shoe found on the foot of the defendant, Hoffman Wells, when he was arrested. There was also evidence tending to show that the bottom of the pants worn by the defendant, Hoffman Wells, the morning after the automobile and wearing apparel were stolen, were wet.

For the purpose of showing that the defendant, Hoffman Wells, broke into and entered the building occupied by D. E. Koontz, as a pressing club, during the night of 22 May, 1930, the State introduced as evidence the testimony of a witness who testified that some time during the succeeding day he examined some bottles, which the evidence showed had been moved during the said night from the inside ledge of the window through which the building was entered; that on one of these bottles the witness discovered a finger print which he developed by a method in general use by finger-print experts; that by means of a magnifying glass he compared this finger print with a finger print which the witness made of the little finger on the left hand of the defendant, Hoffman Wells; and that, in the opinion of the witness, the two finger prints were identical. Before this testimony was admitted, the court heard evidence as to the qualification of the witness to testify as an expert in the art of identifying finger prints. The witness was held to be an expert.

Upon all the evidence submitted to the jury, there was a verdict of guilty. On this verdict, it was adjudged by the court that the defendants be imprisoned in the State's Prison for terms of not less than two nor more than three years, at hard labor, as punishments, respectively, for the felonies charged in each indictment, the terms, however, to be concurrent.

From this judgment defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. O. Woltz and R. A. Freeman for defendants.

CONNOR, J. The motion of the Solicitor for the State that the two indictments in which both defendants were charged with the same crimes, be consolidated for trial, was addressed to the discretion of the court. The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C. S., 4622. *S. v. Cooper,* 190 N. C., 528, 130 S. E., 180; *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590; *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248. In *S. v. Lewis and Padrick,* 185 N. C., 640, 116 S. E., 259, it is said: "If the several bills could have been incorporated in a single indictment as separate counts, there was no sufficient legal objection to the order of consolidation, and in the absence of legal objection the question was addressed to the sound discretion of the court."

In the instant case, it appears that no objection was made by the defendants or by either of them to the consolidation at the time the order was made by the court. The exception first noted in the case on appeal served by defendant's counsel on the Solicitor cannot be considered in this Court. The assignment of error based on the exception to the consolidation of the two indictments for trial, cannot be sustained.

There is no statute in this State relative to the manner in which a jury shall be empaneled for the trial of either a civil or criminal action. The language used by the clerk in his address to the jurors, after they had been duly sworn, was manifestly inadvertent. The judge might very well have directed the clerk to address the jury in the customary language. His failure to do so, however, upon defendant's objection to the language used by the clerk, was not such error as entitles defendants to a new trial. It does not appear that either of the defendants has been prejudiced by the irregularity.

There was evidence tending to show that the witness offered by the State as a finger-print expert, having completed a course of instruction approved by the Superintendent of the Finger Print Department of the United States Army and Navy, requiring two years of study, was qualified to testify as an expert in the art of identification by comparison of finger prints. For this reason, the finding by the trial court that the witness was an expert in the art, and was qualified to testify as such, is not reviewable by this Court on defendant's appeal. *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625, and numerous cases in which it is uniformly held that whether a witness is an expert is a preliminary fact to be found by the trial court, and that when there is any evidence to sustain such finding, it is conclusive on appeal. *Geer v. Durham Water Co.,* 127 N. C., 349, 37 S. E., 474.

The testimony of the witness that he had compared a finger print taken by him of the little finger of the left hand of the defendant, Hoffman Wells, with a finger print discovered by the witness on the bottle which the evidence showed had been moved from the inside ledge of the window in the building which had been entered during the night of 22 May, 1930, after D. E. Koontz, the proprietor of the pressing club, had left the building, and that in the opinion of the witness, formed upon such comparison, the finger prints were identical, was competent as evidence tending to show that the defendant, Hoffman Wells, moved the bottle during said night. This fact, if found by the jury, was relevant to the question involved in the issue submitted to them. Assignments of error based upon exceptions to the finding by the court that the witness was an expert, and to the admission of the testimony of the witness, cannot be sustained.

This is apparently the first case in which this Court has been called on to decide the question as to whether testimony tending to identify a person by means of finger prints is competent as evidence for that purpose. We see no reason why such testimony, when the witness whose testimony is offered as evidence has first been found by the trial court to be an expert in the art, is not competent. The probative value of the evidence is, of course, for the jury. It has been so held by courts of other jurisdictions. In *Willoughby v. State of Mississippi,* reported in 63 A. L. R., at page 1319, it is said: "The evidence of finger print identification has, for a long time, been recognized by the courts of the country as admissible in evidence in order to establish the identity of a party when the comparison of a developed finger print with that of the party alleged to have made it is shown; and such testimony has been received in India, England and the United States. The courts of the country have yielded to the assertion of science that the finger prints of each individual may, by experts skilled in the science, be differentiated from those of any other person." See full annotation in 63 A. L. R., 1324, supplementing previous annotations in American Law Reports.

Other assignments of error relied upon by defendants on their appeal to this Court have been considered. They cannot be sustained. The judgment is affirmed.

No error.

ETHEL BELLAMY, BY HER NEXT FRIEND, EMPLOYEE, v. GREAT FALLS MANUFACTURING COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 29 April, 1931.)

1. **Master and Servant F b—Evidence that injury arose out of accident in course of employment held sufficient.**

Where the evidence tends to show that the employees in the defendant's spinning department were required to remain in the mill for a half hour after work therein had stopped, and that one of the employees therein was injured during this time in an accident while riding in an elevator to another floor with a friend for the purpose of seeing about getting her friend a job in the mill, and that it was the custom of the employees to use the elevator: *Held,* under a liberal construction of the Workmen's Compensation Act, the accident was in the course of the employment and the employee was entitled to compensation.

2. **Master and Servant F a—Workmen's Compensation Act is to be liberally construed and evidence taken in light favorable to claimant.**

The North Carolina Workmen's Act is to be liberally construed to effectuate its purpose to provide compensation for employees injured in accidents arising out of and in the course of their employment, and the evidence in a proceeding thereunder is to be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereof and every reasonable inference therefrom.

APPEAL by defendants from *McElroy, J.*, at December Special Term, 1930, of RICHMOND. Affirmed.

W. R. Jones for plaintiff.
Smith & Joyner for defendants.

CLARKSON, J. This is an action brought by plaintiff against the defendants under the North Carolina Workmen's Compensation Act, Public Laws of North Carolina 1929, ch. 120. Plaintiff contends that under section 2(f) of said act, she sustained injury "by accident arising out of and in the course of the employment." This was denied by defendants. T. A. Wilson, Commissioner, found the facts and his conclusion of law was to the effect that the plaintiff was not entitled to award. On appeal by plaintiff this was sustained by the full Commission. Plaintiff then appealed to the Superior Court. The court below, upon the hearing, reversed the Commission: "The court being of the opinion from the facts appearing in the findings of fact by the Commission that the injury of plaintiff arose out of and in the course of her employment in the meaning of the law, and being of the opinion that the plaintiff is entitled to compensation for her injury. It is, therefore, considered and adjudged that the judgment of the Commission be, and the same is hereby reversed, and this proceeding is remanded to the Industrial Commission to make allowance to the plaintiff as provided by law."

The testimony of plaintiff was to the effect that she was working in defendant's mill in the spinning department, and was just beginning to learn how to do the work, and was working five days a week for 18 cents a day. On April 5, 1930, she was injured. The spinning department had stopped work at 11 o'clock a.m., but the employees were not allowed to leave the building until 11:30 o'clock a.m., and during the time she was required to stay in the mill she was injured. Plaintiff was working on the fifth floor and between 11 and 11:30 o'clock a.m., she rode down to the first floor on the elevator to the weaving room, with Reba Henry to see about getting her a job. In returning on the elevator from the first to the fourth floor, where a gangway led to the outside, she attempted to get off at the fourth floor, Frank Dunlap, who was running the elevator at the time of the injury, pulled her back and she was caught between the elevator and the floor above and seriously injured.

Plaintiff's mother testified: "I am familiar with the workings of the mill. Anybody that wants to, has the privilege of using the elevator.

I work there and have been there five years. It is the custom for anybody to use the elevator that wants to. Anybody who wants to can run it. That has been the custom since I have been there. . . . She has not been able to work since the injury. She had a hemorrhage of the kidney several times. The first time was the night after the accident and then there was another about a week from then that lasted three days. There is a pretty bad dent across her thigh and she is bruised about the body. It seemed that the worst hurt was in the right side. Sometimes she suffered so that it took two or three of us to hold her on the bed."

It was in evidence that there were stairs from the first to the top or fifth floor.

It is the well settled rule of practice in this jurisdiction, in cases of nonsuit and cases of this kind, that the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In L. R. A., 1916-A, at p. 237, we find: "An employee in a mill is not outside the scope of her employment in going from an upstairs room, where her work had run out, to a room down stairs, where she had been told by the overseer that there was work for her to do. And an employee by the week in a shop does not go outside of the employment merely because she leaves the shop for the purpose of getting a lunch. (Note 99) in *Sundine's case* (1914), 218 Mass., 1, *post* 318, 105 N. E., 433, it was held that a girl employed in a shop who was employed by the week, does not go outside of the employment merely because she leaves the shop for lunch. The Court said: 'The decisions upon similar questions under the English act are to same effect (citing authorities). Where one went on the ground at the dinner hour, though not paid for, was yet included in the time of employment (citing authorities). That a temporary absence of permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that, an injury occurring during such temporary absence arose out of and in the course of the employment,' " citing numerous other authorities. *Ryerson v. A. E. Bounty Co.* (Conn.), 140 Atlantic Rep., 728; *Holmes' case* (Mass.), 166 N. E. Rep., 827; *Parrish v. Armour Co., ante,* 654.

"Affirming judgment for plaintiff, the Court held that a workman, if during his working hours there are intervals of leisure, may, during such intervals within reasonable limits, move from place to place on the premises of the employer and visit with fellow employees, if he refrains from exposing himself voluntarily to known or visible hazards or dangers; and that the injury of deceased, under a liberal construction of the act, occurred in the course of his employment. *Twin Peaks Canning Co. v. Industrial Commission* (Utah), 196 Pac., 853 (1921)." 20 Negligence and Compensation Cases (Anno.), p. 557.

"Plaintiff was employed by the defendant insurance company, working on the eleventh floor of a building owned by the defendant and occupied by it and its tenants. It furnished elevator service only up to the eleventh floor, and on the twelfth floor served lunch free to its employees, who were allowed a free period of 35 minutes, during which they could use the free lunch service, or go outside the building as they chose. Plaintiff, having gone to the twelfth floor for lunch, returned to her desk on the eleventh floor, secured her pocketbook and entered the elevator to be taken to the ground floor, intending, it appeared, to leave the building on a personal errand during the remainder of her free period. While leaving the elevator she was injured, and in this suit to recover damages she ascribed her injury to the negligence of the operator of the car. In reversing a judgment for damages, the Court held that it was the duty of the defendant, as employer, to furnish plaintiff and other employees with an exit from their place of work to the street, available at any time when their services were not required, and hence the plaintiff was still in the course of her employment at the time of the accident, regardless of whether her employment were deemed to continue through the lunch hour, and regardless of her purpose in leaving the building. It followed, the Court held, that the case was governed by the Workmen's Compensation Act, and there could be no recovery at law. *Martin v. Metropolitan Life Ins. Co.,* 197 N. Y. App. Div., 382, 189 N. Y. Supp., 467 (1921)." 21 Negligence Compensation Cases (Anno.), p. 644, note 2.

In *Nor. Car. R. R. Co. v. Zachary,* 232 U. S. Rep., at p. 260, we find: "Again, it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co. v. United States,* 231 U. S., 112, 119." 156 N. C., 496; *New York Cent. R. Co. v. Marcone, Admr.,* 281 U. S. Rep., 345.

Plaintiff was compelled to stay in the mill until 11:30 a.m. She was "on duty" and was injured before the time expired for her to go off duty. The mission she went on, while she was "on duty" was in the mill, was a temporary purpose, and not such a departure from the employer's business that we could say from a liberal construction of the act that it was not in the course of the employment. In fact, she went with a friend to get her employment in the mill, and in doing so did not leave the mill. Under the facts and circumstances of the case and the conduct of plaintiff, what she did was too casual to bar a recovery. The judgment of the court below is

Affirmed.

N. W. CRANFIELD v. CITY OF WINSTON-SALEM.

(Filed 29 April, 1931.)

Municipal Corporations E c—Evidence as to approved guards for ditch in street and ordinance in regard thereto held irrelevant.

Where in an action against a city the evidence tends to show that roping used by the city to guard a ditch in the street was caught in a city truck being used to deliver wood to the poor of the city as a charitable measure, and that the truck threw the rope against the plaintiff causing the injury in suit: *Held*, the evidence discloses that the injury resulting from an unforeseen accident unrelated to the proper guarding of the ditch, and evidence as to the usual method of guarding ditches and the means approved and in general use, and an ordinance of the city in respect thereto, is irrelevant, and the refusal of the court to admit such evidence is not error.

CIVIL ACTION, before *Cowper, Special Judge,* at April Term, 1930, of FORSYTH.

Plaintiff alleged and offered evidence tending to show that on or about 10 May, 1928, the city of Winston-Salem, in order to install a water main dug a ditch on the west side of Lexington Road. On the east side of the ditch the employees of the city erected a rope barricade. The rope was small and was stretched from one stake to another, the stakes being approximately three feet high and fifteen or twenty feet apart. The dirt from the ditch was thrown out on the opposite side from the rope barricade. The plaintiff testified that while he was walking on the right-hand side of the road next to the rope barricade and approaching Renegar's store, "there was a truck that had pulled up between Renegar's store and another store there, . . . and the truck backed out from between those two stores right in front of me, crossways of the road. . . . That truck backed there and caught that rope and the colored man who was driving the truck, shifted his gears right quick and started forward, jerked up the stakes and jerked that rope right up under my arm and threw me sideways toward Mr. Renegar's store, and I hit the front bumper of Mr. Kearn's car, and it broke my leg to pieces. . . . The truck started up mighty fast. The rope had gotten hooked to the back of the truck." There was other evidence tending to show that the rope was about ten inches from the edge of the ditch.

The evidence further tended to show that the truck that caught the rope belonged to the city and was usually used for hauling garbage. The evidence further tended to show that at the time of the injury the truck was engaged in delivering a load of wood that the city of Winston-Salem had donated to a woman who was without fuel.

At the conclusion of the evidence judgment of nonsuit was entered and the plaintiff appealed.

J. M. Wells, Jr., and Archie Elledge for plaintiff.
Parrish & Deal for defendant.

BROGDEN, J. During the trial plaintiff asked leave of the court to amend the complaint in order to set up section 109 of the ordinances of the city, and that the city negligently failed to comply with said ordinances, and that such negligence was the proximate cause of his injury. The plaintiff offered in evidence section 109 of the ordinance of defendant city, which is as follows: "It shall be unlawful for any person to make any excavation or do any work which may create or cause a dangerous condition in or on or near any street, alley, sidewalk or public place of the city without placing and maintaining proper guard rails and signal lights, or other warnings, at, in or around the same sufficient to warn the public of such excavation or work, and to protect all persons using reasonable care from injuries on account of same."

The court refused to permit the amendment upon the ground that "said ordinance has no application to this case."

The plaintiff also offered the testimony of expert witnesses tending to show that approved barricades and such as were in general use in excavation work were constructed by the use of a buck and a plank, said bucks being placed from twelve to sixteen feet apart. Plaintiff also attempted to offer evidence as to the customary methods of barricading ditches upon streets during excavation. All of this evidence was excluded by the trial judge, and the defendant assigns the ruling of the court as error.

The ordinance, upon its face, was designed "to warn the public of such excavation or work and to protect all persons using reasonable care from injuries on account of same"; and as the plaintiff was not injured by reason of the excavation, it is apparent that the ruling excluding the ordinance from the evidence was correct. In other words, if the plaintiff had fallen into the ditch or had been injured by reason of the excavation, perhaps the ordinance would have been pertinent. Moreover, "general statutes do not bind the sovereign unless specifically mentioned in them." *O'Berry v. Mecklenburg County,* 198 N. C., 357; *Guilford County v. Georgia Co.,* 112 N. C., 34.

Indeed, the evidence discloses that the injury was solely attributable to the fact that a garbage truck in some unaccountable way became engaged with the rope barrier, jerking it from its position and injuring plaintiff. Foreseeability of injury is still an element of proximate cause. This idea was compactly expressed by *Connor, J.,* in *Fore v. Geary,* 191 N. C., 90, as follows: "No man, by the exercise of reasonable care, however high and rigid the standard of such care, upon the facts in any particular case, can foresee or forestall the inevitable accidents, and contingencies which happen and occur daily, some bringing sorrow and loss, and some bringing joy and profit, all however contributing, in part, to make up the sum total of acts, which they can and should foresee and by reasonable care and prudence, provide for." *Gant v. Gant,* 197 N. C., 164. The same reasoning which excludes the application of the ordinance also excludes the evidence as to proper construction of barricades or usage and custom relating thereto, because the plaintiff was not injured by the barricade alone, but by reason of the independent agency of the garbage truck.

There is allegation in the complaint to the effect that the garbage truck was negligently operated, but the question of legal liability of a city for the negligent operation of a garbage truck engaged in the charitable enterprise of hauling wood to a poor person, is not discussed in the brief of appellant. See *Scales v. Winston-Salem,* 189 N. C., 469; *Wood v. Boone County,* 133 N. W., 377; Ann. Cas., 193 (D), 1070; *Johnston v. City of Chicago,* 101 N. W., 960; *Gaetjens v. City of N. Y.,* 116 N. Y. S., 759; *Scibilia v. Philadelphia,* 124 Atlantic, 273; 32 A. L. R., 981; *Cowans v. North Carolina Baptist Hospitals,* 197 N. C., 41.

Affirmed.

R. U. BARBER AND W. R. DENNING, PARTNERS, ASSOCIATED UNDER THE FIRM NAME OF BARBER & DENNING, v. THE TOWN OF BENSON.

(Filed 29 April, 1931.)

Taxation E b—In this case held: injunctive relief against collection of taxes would lie.

Although injunctive relief against the collection of taxes will not ordinarily lie unless the tax itself is illegal or invalid, the remedy of the person assessed being to pay the tax under protest and bring action for its recovery, if circumstances are shown sufficient to invoke the aid of a court of equity, injunctive relief may be had, and in this case the evidence being to the effect that the defendant town had levied a tax under C. S., 7971 (56) on personal property of a partnership doing business therein, and had thereafter agreed with the partners that they were not liable therefor for the reason that they lived outside the corporate limits, and had not made further demand therefor until two years later when it undertook to compel the plaintiffs to pay back taxes for a period of five years: *Held*, sufficient to support the intervention of a court of equity, and judgment dissolving a temporary injunction is error.

CIVIL ACTION, before *Devin, J.*, at November Term, 1930, of JOHNSTON.

The plaintiffs are partners, and one of the partners lives in Elevation Township, in Johnston County, and the other in Averasboro Township, said county, both residing outside the corporate limits of the town of Benson. During the year 1930 the defendant town levied a tax on the personal property of plaintiffs, consisting principally of solvent credits, for the years 1925, 1926, 1927, 1928, 1929, and 1930. The amount of tax thus levied was $1,949.91.

The town, in order to collect said tax, advertised the real estate of one of the partners situated within the corporate limits of the town, and thereupon the plaintiffs instituted this action to restrain the sale of said property for said taxes, alleging that the personal property of the partnership was not subject to the tax, and hence the levy was illegal and unauthorized. Plaintiffs further allege that during the year 1928 the personal property of the partnership was listed for taxation and demand made for the payment of same, and that plaintiffs "immediately took the matter up with the legal department of the town of Benson, and it was then and there decided that said property was not properly listable in the town of Benson, and the tax and its assessment was thereupon annulled; and the plaintiffs had no further demand from the defendant town until during the present year of 1930, when the personal property of the plaintiff copartnership was illegally assessed as hereinbefore set out."

The town filed an answer denying the allegations of the complaint and alleging that while the partners might live outside of the town, yet the business was conducted within the town, and hence the plaintiffs were liable for the tax by reason of the provisions of C. S., 7971(56). A temporary injunction was granted until the hearing. The cause was submitted to W. A. Devin, Judge presiding, who rendered judgment dissolving the restraining order upon the ground that it appeared "to the court that this is an action to restrain the sale of said property for taxes alleged to be due by the firm of Barber & Denning; and it further appearing that the only question presented by the pleadings is the situs of the property taxes; it is the opinion of the court that the plaintiffs are not entitled to the injunctive relief prayed for," etc.

From the foregoing judgment the plaintiffs appealed.

Ezra Parker and Clifford & Williams for plaintiffs.
W. H. Strickland and J. E. Johnson for defendant.

BROGDEN, J. The pleadings and the judgment produce the following question of law: Was it the duty of plaintiffs to pay the tax under protest and sue to recover same, or was injunction an available remedy?

C. S., 7971(56) provides in part, "for the purpose of assessing property and collecting taxes. Copartnership shall be treated as an individual and property shall be listed in the name of the firm. A copartnership shall be deemed to reside in the township, town or city where its business is principally carried on. Each partner shall be liable for the whole tax."

The plaintiffs contend that injunction was the proper remedy to pursue, and the defendant, upon the other hand, contends that plaintiffs were required to pay the tax under protest and sue for recovery. The contentions so made may be solved by an application of the principle announced in *Sherrod v. Dawson,* 154 N. C., 525, or *Ragan v. Doughton,* 192 N. C., 500.

Personal property ordinarily follows the person, but our statute above referred to provides that the situs of partnership property is the place "where its business is principally carried on." Referring to the taxing of solvent credits, the Court in *Sherrod v. Dawson, supra,* said: "Property of this character is subject to taxation only where the true owner resides. The legality of either tax can only be determined when the residence of the real owner shall be ascertained and fixed by the jury." All authorities agree that an injunction will lie to restrain the collection of a tax "if the tax itself be illegal or invalid." Therefore, the ruling of the Court in the *Sherrod case* relates the legality of the tax to the residence of the real owner and would seem to be determinative of the legal question involved in this case.

The *Ragan case, supra,* proceeds upon the theory that the taxpayer had no basis for resisting the payment of the tax except upon the ground that he did not come within the class taxed, and hence ordinarily "in the absence of circumstances sufficient to invoke the aid of a court of equity, his remedy . . . is paying it under protest and then suing to recover it back." Conceding, then, that the *Ragan case* applies, are there any circumstances in the case at bar "sufficient to invoke the aid of a court of equity?"

It was alleged that in 1928 the defendant town levied a tax upon the personal property of plaintiffs and that upon protest the defendant annulled the assessment and made no further demand until 1930, when the defendant then undertook to compel the plaintiffs to pay back taxes for a period of five years.

Under such circumstances, the Court is of the opinion that there are facts sufficient to support the intervention of a court of equity, and hence the judgment dissolving the injunction is

Reversed.

HENRY CLARK BRIDGERS, TRUSTEE IN BANKRUPTCY OF CAROLINA LEAF TOBACCO COMPANY, v. B. M. HART.

(Filed 29 April, 1931.)

1. **Bankruptcy C c—Payment must be on pre-existing debt in order to constitute preference under Bankrupt Act.**

   In order for a payment made within four months of bankruptcy to be an invalid preference under the provisions of the Bankrupt Act, the debt must be a preëxisting one and not for a present valuable consideration.

2. **Same—Question of whether payment of expenses and taking of business trip for bankrupt was one transaction held for jury.**

   Where under a request and promise to repay expenses an officer of a corporation advances his own money to finance a trip for himself and others taken in the interest of the corporation which results to the advantage of the corporation, and takes several days in its accomplishment, and these expenses are refunded by the corporation several days afterward, the question is for the jury under the evidence and correct instructions from the court as to whether the taking of the trip and the refund of the expenses constituted one transaction, and if found by the jury in the affirmative it will not constitute an unlawful preference within the meaning of the Bankrupt Act.

CIVIL ACTION, before *Cranmer, J.,* at November Term, 1930, of EDGECOMBE.

The Carolina Leaf Tobacco Company filed a petition in bankruptcy in June, 1925. The defendant was president of the company. On 13 May, 1925, the corporation paid to the defendant in coal the sum of $300. The plaintiff, trustee in bankruptcy, sues to recover said sum of $300, upon the theory that the payment by the bankrupt, constituted a voidable preference.

The defendant offered evidence tending to show that about 1 May, 1925, he was in Marion, North Carolina, and the officials of the bankrupt wired him to go to New York in an effort to recover certain assets belonging to the corporation, and that in response to said telegram he went to New York and spent out of his own funds the sum of $300 to defray his own and the traveling expenses of other officers of the company. There was further testimony that before the defendant undertook to make the trip that it was understood and agreed between him and the directors of the corporation that his expenses so advanced were to be repaid upon his return. He further testified that in two or three days after his return from New York to Tarboro the bankrupt delivered three hundred dollars worth of coal to him in payment of expenses advanced, and in accordance with the previous agreement. There was other testimony to the effect that the coal was delivered to the defendant on Monday or Tuesday after his return from New York on Saturday night.

The following issue was submitted to the jury:

"Did the payment of the $300 constitute a preference under the bankruptcy laws of the United States as alleged in the complaint?"

The trial judge instructed the jury to answer said issue "Yes."

From judgment upon the verdict the defendant appealed.

Henry C. Bourne for plaintiff.
George M. Fountain for defendant.

BROGDEN, J. If an officer of a corporation, within four months of bankruptcy, advances money out of his own funds to defray his expenses to a distant city for the purpose of making investigation for the corporation, when the directors have agreed that the money so advanced would be repaid upon his return, does such repayment constitute a voidable preference as contemplated by the bankruptcy law?

One branch of this litigation was considered by this Court and reported in 198 N. C., 494. The pertinent element of a voidable preference applicable to the facts in the case at bar, is thus stated in 4 Remington on Bankruptcy, sec. 1694: "Third Element of a Preference-Creditor's Claim Must Have Been Pre-Existing Debt—the creditor's claim must have a debt—a preëxisting debt; and the transfer will not amount to a preference if made contemporaneously with (or before) the rising of the claim." That is to say, if a bankrupt receives cash or its equivalent and contemporaneously therewith transfers property in good faith, such transaction does not constitute a voidable preference.

The plaintiff contends that the transfer was not contemporaneous for the reason that several days elapsed between the time the defendant made the trip to New York and the actual delivery of the coal in payment of expenses incurred. There is ample evidence that the efforts of defendant resulted advantageously to the corporation, for that substantial assets were discovered. The defendant, upon the other hand, contends that the transaction was contemporaneous for the reason that the request to make the trip, the agreement of the directors to reimburse the defendant upon his return and the actual payment a few days thereafter constituted one transaction. In this connection 4 Remington, 462, *supra,* states the principle as follows: "It is not necessary that the transfer and the payment of the consideration be absolutely simultaneous, if they be truly a part of the same transaction; thus, where a corporation, in financial straits, authorized the execution of a chattel mortgage for money to be loaned; thereupon, three days later, the money was paid; and, subsequently, six days after the payment, the mortgage was formally executed; these occurrences were held to constitute but one transaction, on present consideration." The text is supported by *In re Metropolitan Dairy Co.,* 224 Fed., 444. In that case a loan was made on 17 June, and a chattel mortgage securing the payment thereof was executed on 23 June. The Court said: "If the mortgage had been given at the same time as the loan was made, there could be no question. It is a wholly novel proposition to us that the officers and director of a corporation, which is losing money, is in financial straits, and facing imminent failure, may not lend it money of his own on its mortgage of its personal property, to secure only the cash turned over, without, by any subterfuge, including any existing indebtedness to him." Referring to the payment of the money on 17 June, and the mortgage executed on 23 June, the Court said: "If this be so, we do not see why it was not a single transaction—why the execution and filing of the mortgage does not, under the resolution, date back to the moment of receiving the loan for which it was given." U. S. C. A., Title 11, page 399, *et seq.*

Whether the sum advanced by the defendant and repaid by the bankrupt a few days thereafter constituted one transaction under all the facts and circumstances must be submitted to a jury upon proper instructions by the trial judge.

Reversed.

WACHOVIA BANK AND TRUST COMPANY, RECEIVER, v. H. C. HUDSON AND C. R. WHARTON, TRUSTEES.

(Filed 29 April, 1931.)

1. **Contracts B a—General laws in force at time of execution of contract become part thereof.**

   The general laws of the State in force at the time of the execution of a contract enter into and become as much a part of the contract as if they were expressly incorporated in its terms.

2. **Mortgages H h—Execution of power of sale by receiver of trustee held valid under the facts of this case.**

   A land company borrowed money on its property and conveyed it to a bank as trustee to secure notes in the hands of purchasers, the deed directing foreclosure by the trustee or its successors or assigns upon certain conditions, and the trustee bank becoming insolvent and a receiver being appointed, the court ordered the receiver to foreclose and make title to the purchaser at the sale, the receiver executed the power of sale contained in the deed of trust in accordance with its terms, and offered a deed in proper form to the purchaser: *Held*, applying C. S., 1209, 1210, under the facts of this case, the deed was sufficient in law to pass title.

APPEAL by defendants from *Clement, J.*, March Term, 1931, of FORSYTH.

Controversy without action submitted on an agreed statement of facts, which, without impairment to a proper understanding of the legal question involved, may be condensed or abridged into the following:

1. On 1 February, 1922, Moore County Farms, Inc., a North Carolina corporation, executed to the Merchants Bank and Trust Company, a banking corporation organized under the laws of the State, as trustee, a deed of trust on a number of farms to secure certain of its bonds, made payable to bearer, which said deed of trust contained the usual power of sale in case of default, and made it "the duty of the said trustee, party of the second part, its successor or assignee, upon the request in writing of the holder or holders of as much as 20 per cent of said bonds to advertise the premises for sale, . . . and upon such sale, after deducting the cost and expenses thereof and 3 per cent commission to the trustee, pay off the bonds secured thereunder . . . making a deed to the purchaser at such sale in fee simple."

2. Thereafter, on 14 June, 1926, in an action by the Corporation Commission against the Merchants Bank and Trust Company, the Wachovia Bank and Trust Company, a banking corporation organized under the laws of North Carolina, was appointed permanent receiver

of the Merchants Bank and Trust Company, on the ground of insolvency, the order of appointment specifically empowering the said receiver "to foreclose by advertising under the power of sale, through suits in court, or otherwise, as it deems best, all mortgages, real and chattel, deeds of trust, and is hereby authorized to effect the sale of all other properties pledged to the defendant."

3. Default having been made by the Moore County Farms, Inc., in the payment of its bonds, secured as aforesaid, the Wachovia Bank and Trust Company, receiver of the trustee named in the deed of trust, at the request of the holders of as much as 20 per cent of said bonds, duly foreclosed under the power of sale and the order of court, at which sale the defendants became the last and highest bidder for the lands covered by said deed of trust, bidding therefor the sum of $15,000.

4. No upset bid having been filed, the receiver duly tendered deed to the defendants, which was refused because of plaintiff's alleged want of authority or power to make the sale and to pass title to the property. Whereupon, this controversy without action was submitted. Judgment for the plaintiff was entered in the Superior Court, and the defendants appeal, assigning error.

Manly, Hendren & Womble for plaintiff.
H. G. Hudson and C. R. Wharton for defendants.

STACY, C. J. Is the receiver's deed, duly executed as to form, sufficient to convey title to the lands covered by the deed of trust? An affirmative answer to this question will uphold the judgment, while a negative one will reverse it.

It was held in *Strauss v. Building & Loan Asso.,* 117 N. C., 308, 23 S. E., 450 (decided in 1895), on rehearing, 118 N. C., 556, 24 S. E., 116 (decided in 1896), that a receiver of an insolvent building and loan association, in the absence of an order of court, was not authorized to foreclose a mortgage made to the corporation in which the corporation alone was empowered to foreclose by sale. This was subsequently approved in *Thompson v. Loan Asso.,* 120 N. C., 420, 27 S. E., 118 (decided in 1897).

But the Legislature, thereafter, at its regular session, 1901, amended the law, and specifically clothed receivers of corporations with the power and authority to "foreclose mortgages, deeds of trust, and other liens executed to the corporation," now C. S., 1209; and further provided in the same act, ch. 2, Public Laws 1901, now C. S., 1210, that "all of the real and personal property of an insolvent corporation, wheresoever situated, and all of its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto."

It is the contention of the plaintiff that under the foregoing statutory provisions, which were in force at the time of the execution of the present deed of trust, the receiver of the trustee is by implication, if not expressly, authorized to execute the power of sale in the deed of trust, especially as the instrument provides for the payment of a commission of 3 per cent to the trustee, its successor or assignee, all of which is confirmed by order of court.

It was said in the recent case of *Mitchell v. Shuford, ante,* 321, that the provisions of a deed of trust are contractual, but the general laws of the State, in force at the time of the execution of a contract, enter into and become as much a part of the contract as if they were expressly referred to or incorporated in its terms. *House v. Parker,* 181 N. C., 40, 106 S. E., 137; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 597. Hence, under the law in force at the time, and in view of the provisions of the present deed of trust and the order of court directing the receiver to foreclose all mortgages, deeds of trust, and authorizing it to effect the sale of all other properties pledged to the insolvent trustee, we are of opinion that the deed tendered is sufficient in law to convey to the defendants a fee simple title to the lands covered by the deed of trust. This was the holding of the Superior Court, and the judgment is

Affirmed.

D. A. HARMON v. THE TOWN OF BESSEMER CITY.

(Filed 29 April, 1931.)

Municipal Corporations E b—In action for damages caused by sewage, submission of issue of permanent damage over objection held error.

In an action by the owner of lands against a city to recover damages caused by an overflow of a stream containing sewage, the parties have the right to confine the inquiry to temporary damages, and where they have done so, an issue as to permanent damages submitted by the court in lieu thereof over the plaintiff's objection is reversible error.

APPEAL by plaintiff from *Moore, J.,* and a jury, at September Term, 1930, of GASTON. New trial.

This is an action for actionable negligence brought by plaintiff against defendant. Plaintiff in his complaint alleges that in constructing and operating defendant's sewerage system that "raw sewage is carried out and down the stream and is thrown over the premises of the plaintiff; that the bottom land of the plaintiff's land is subjected to the said overflow and the said deposits of the said raw sewage, and the plaintiff is greatly damaged and injured by reason of injury to his pasture lands, and by offensive odors."

The allegation of plaintiff is further to the effect that for three years prior to bringing this action this wrong has been done him. "That, by reason of said negligent acts of defendant, the value of the plaintiff's land has been diminished in a large sum, namely, in the sum of $5,000."

The material facts set forth by plaintiff were denied by defendant in its answer. "For a further answer and defense defendant says that the injury of plaintiff, if any, was caused solely by the act of God in a down-pour of waters that were unprecedented, which caused the sewerage outfall of defendant to become filled with sediment and sand, and before defendant could and did repair the same some small portion of its sewage was swept down the run through plaintiff's lands, but without any injury or possibility of injury to plaintiff."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff the owner of the lands described in the complaint over which the defendant discharges sewage, as alleged? Answer: Yes.

2. Has the plaintiff been damaged by the defendant, as alleged in the complaint? Answer: Yes.

3. What permanent damages is the plaintiff entitled to recover? Answer: $700."

R. G. Cherry and George W. Wilson for plaintiff.
S. J. Durham for defendant.

CLARKSON, J. The plaintiff, as he had the right, did not sue for permanent damage to his land. The defendant, as it had the right, being a municipality with the right to condemn the land, an easement for sewerage purposes, did not in its answer pray that this be done and permanent damages assessed.

The plaintiff excepted and assigned error to the third issue *submitted by the court:* "What permanent damages is the plaintiff entitled to recover?"

The plaintiff tendered issue as to temporary damage and excepted and assigned error as to the issue of permanent damage submitted by the court. We think the exception and assignment of error well taken. This whole matter has been recently discussed in *Wagner v. Conover, ante,* 82.

On the record plaintiff is entitled to a
New trial.

STATE v. GORDON WATKINS.

(Filed 29 April, 1931.)

Homicide D a—Whether pair of handcuffs was "deadly weapon" held question for jury, and instruction in this case was reversible error.

As to whether a pair of handcuffs will be considered as a deadly weapon ordinarily depends upon their size, the material of which made, the relative strength and weakness of the assailant and assailed, and is usually a question for the jury, and under an indictment for a felonious killing, evidence that the assailant struck the deceased with a pair of handcuffs with other evidence tending to show that other causes resulted in the death of the deceased, an instruction "that an assault, when made with an instrument such as a pair of handcuffs would constitute in law an assault with a deadly weapon" is error, the question being for the determination of the jury.

CLARKSON, J., dissenting.

STACY, C. J., concurring *quære de dubiis.*

ADAMS, CLARKSON, CONNOR and BROGDEN, JJ., approving another instruction as to manslaughter, assault, and assault with a deadly weapon.

APPEAL by defendant, Gordon Watkins, from *Sink, Special Judge,* at October Term, 1930, of WAKE.

Criminal prosecution tried upon the following bill of indictment:

"The jurors for the State upon their oath, present, that Gordon Watkins, Vance Mangum and Swannie Council, late of the county of Wake, on the 26th day of July, in the year of our Lord, 1930, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did kill and slay Willie Bellamy, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

Gordon Watkins, Vance Mangum and Swannie Council were supervisor, tractor driver and guard, respectively, of Prison Camp No. 5, Wake County, and Willie Bellamy was a prisoner assigned to work at said camp under a *mittimus* from the city court of Raleigh.

The evidence is in sharp conflict as to the character of treatment accorded the deceased by the defendants who had him in custody while a prisoner assigned to work on the public roads of Wake County. The State contended that Bellamy's death resulted from working him in the hot sun, while sick, without adequate food, and thereafter confining him in a sweat-box for disciplinary purposes. He died at St. Agnes Hospital, 11:30 p.m. Saturday, 26 July, 1930. The cause of death was stated by the attending physician to be, "Heat prostration with convulsive seizures, producing acute congestion of brain. Contributing cause, excessive hot weather."

Willie Bellamy was a large, colored man who weighed about 175 or 180 pounds. The evidence tends to show that he was unruly; sullen; impudent; declined to work; refused to obey orders; and that he tried to assault the defendant Watkins.

At the close of defendants' evidence, the State called two witnesses in rebuttal, one of them Ed. Perry, a fellow refractory prisoner, who testified that, when the prisoners came into the camp from their work at the end of the half-day, noon Saturday, 26 July, Willie Bellamy "tried to drink some water from the wash basin (provided for bathing purposes). Capt. Gordon (Watkins) knocked it out of his hands and asked him what he was trying to do. He hit him on the nose with a pair of handcuffs. They carried him to the dark cell and I did not see him any more." (Cross-examination) "Capt. Gordon (Watkins) hit him on the nose with handcuffs."

All the witnesses for the defendant, who were present at the time, denied that the defendant struck the deceased with his handcuffs. The only mark on the body of the deceased was a slight abrasion on the nose, which H. P. Thompson, witness for the State, thought was caused by a protruding plank in the solitary confinement cell. He said: "It stuck out about an inch and his nose was resting on that, and it looked like that was what might have caused it."

It is not contended that the blow on the nose with the handcuffs, if made, caused Bellamy's death or contributed thereto.

The court instructed the jury that "an assault, when made with an instrument such as a pair of handcuffs, would constitute in law an assault with a deadly weapon." Exception.

Verdict: Not guilty as to Vance Mangum and Swannie Council. Guilty of "an assault with a deadly weapon" as to Gordon Watkins.

Judgment: Imprisonment in county jail for a term of six months.

The defendant, Gordon Watkins, appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John W. Hinsdale, Percy J. Olive and J. C. Little for defendant.

STACY, C. J. The question of assault with a deadly weapon was not the principal matter debated on the hearing, but rather the charge of manslaughter, the main contention of the State being that Bellamy's death resulted from criminal neglect on the part of the defendants.

The only evidence to support the verdict "guilty of an assault with a deadly weapon" is the bare statement of Ed. Perry (repeated on cross-examination) that the defendant, Watkins, hit the deceased on the nose with a pair of handcuffs. There is no description by the witness of the size of the handcuffs, whether large or small, nor of their weight, whether heavy or light, nor of their character, whether of metal, leather or rope, nor of the manner of their use, whether a light, glancing or full-faced blow was struck. Nor were the handcuffs themselves offered in evidence. It is not contended that the assault with the handcuffs caused the death of the deceased or contributed thereto.

In this state of the record, we think his honor erred in instructing the jury that "an assault, when made with an instrument such as a pair of handcuffs, would constitute in law an assault with a deadly weapon." *S. v. Smith,* 187 N. C., 469, 121 S. E., 737.

Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N. C., 165 at page 179. But where it may or may not be likely to produce such results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N. C., 505. "Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used," the question is for the jury. *S. v. Archbell,* 139 N. C., 537, 51 S. E., 801; *S. v. Norwood,* 115 N. C., 789, 20 S. E., 712; *S. v. Huntley,* 91 N. C., 621. "If its character as being deadly or not depended upon the facts and circumstances it became a question for the jury with proper instructions from the court." *S. v. Beal,* 170 N. C., 764, 87 S. E., 416. See, also, *S. v. Hefner,* 199 N. C., 778; *S. v. Phillips,* 104 N. C., 786, 10 S. E., 463; *S. v. Porter,* 101 N. C., 713, 7 S. E., 902; *S. v. Collins,* 30 N. C., 407.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

New trial.

CLARKSON, J., dissenting: The evidence against the defendant was to the effect that the defendant, with Vance Mangum and Swannie Council, was brought to trial upon an indictment in the ordinary form for the homicide of Willie Bellamy. The Solicitor asked only for a verdict of manslaughter against these defendants. Upon this charge the jury acquitted Vance Mangum and Swannie Council and convicted Gordon Watkins of an assault with a deadly weapon.

C. S., 4639, is as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character." *S. v. Hunt,* 128 N. C., at p. 586; *S. v. Williams,* 185 N. C., at p. 688. The defendant was convicted of "an assault with deadly weapon." This has been permissible since act of 1885, chap. 68, which is C. S., 4639, *supra,* if the evidence shall warrant such finding—which is not questioned in this case.

The defendants all had charge of the convicts, sentenced to work upon the public roads of Wake County, either as guards or otherwise. The State's evidence tended to show that the defendant, Willie Bellamy, was sentenced to work upon the public roads and was assigned to work at Camp No. 5. He was carried to this camp the afternoon of Monday, 21 July, and was put to work the following morning. The weather was hot and Bellamy, though a stout-appearing man, was evidently unaccustomed to hard labor in the hot sun. In consequence of his failure to work properly on the outside, he was given only bread and water for his supper that night and the same thing for breakfast Wednesday morning. On Wednesday he was brought back to the camp from working on the roads about noon and the county physician, Dr. R. W. Wilkerson, was called to see him. The doctor prescribed certain medicine and advised that he be kept in the next day. Friday morning he was carried out to the roads to work and when brought in that night, ate the usual rations. Watkins, the defendant, inquired about this and said that Bellamy did not work much and then put him in the sweat-box. The next morning, Saturday, he was given only bread and water and carried out to work, notwithstanding Dr. Wilkerson had told them to be easy with him the next few days, according to the defendant's own admission. The defendant, on cross-examination, testified: "*Although the doctor had told me he was mighty hot and very tender I put him in the sweat-box with shackles on and the chain locked down to the staple on the floor.* Blankets were in there, but I did not see if he could reach them for that was the steward's job. I have never made the statement that his hands were not locked behind him on Friday night. On Saturday morning I took him from the dark cell and gave him his hands. He went out Saturday morning and worked about two hours and about ten o'clock I went down to where he was and found him lying in the shade. I knew he was the man who Dr. Wilkerson *had told me to go easy with for three or four days,* and I confined him in the sweat-box in the middle of the day with another man. After Bellamy had been in the sweat-box for some time Mr. Thompson told me that he appeared to be sick. *I found him lying with his face down. I sent for some water and poured on him and unchained him.* I turned him over and when I put the water on him he said 'It feels good.' I thought he was playing with me; I handcuffed him to find out to give him a chance to get up, he got up and turned around. I found that something was wrong with him and in such condition that I sent for the doctor. He was later brought out of the sweat-box by Mr. Thompson and put in the shade. Mr. Thompson came to my quarters and asked if he could take him out. I came out in the yard and saw them bringing him out." He was kept this way in the sweat-box all night.

While at work Saturday morning he was taken sick and brought in at noon. Notwithstanding his sickness, he was given only bread and water and confined in the sweat-box. The sweat-box was located in an open field about 40 or 50 yards from any trees. It was built out of oak timber about 1½ inches thick, 3½ feet wide, 6 feet high and 7 feet long. There was an opening around the top that had a wire screen on it and there was a big crack in the right-hand corner, at the entrance to the door. The roof was of boards and tar paper. It did not have any tin roof at that time. After he had been thus put in the sweat-box, in the middle of an exceedingly hot day, he grew so much worse that the doctor was sent for and he was carried to St. Agnes Hospital in Raleigh, where he died that night. When he was carried to the hospital, his temperature was 110 and he was unconscious. The only bruise that was found upon him at that time, *was a scratched place across his nose, 1¼ inches long and ¾ of an inch wide.* It appears that this wound was caused by the defendant, Watkins, striking him at noon, Saturday, with a pair of handcuffs.

Ed. Perry, testified, in part: "I was a prisoner at Camp No. 5 during week of July 21st to 26th. On Saturday when we got to the camp and got to the wash basin he (Bellamy) tried to drink some water from the wash basin. Capt. Gordon (Watkins) knocked it out of his hand and asked him what he was trying to do. He hit him on the nose with a pair of handcuffs. Capt. Vance went up behind him and knocked him on the ground and they carried him to the dark cell and I did not see him no more."

This appeal is narrowed down to one question—under the facts and circumstances of this case did the "handcuffs" constitute a deadly weapon? The court below, after reciting the contentions of the State in accordance with the evidence as above set forth, charged the law of criminal negligence, manslaughter and the following: "An assault is an attempt to do a corporate hurt to another; it is unlawful physical force applied to another and an assault, as defined to you, when made with an instrument such as a pair of handcuffs, would constitute in law an assault with a deadly weapon. An attempt to do a corporate hurt to another without the use of anything other than the human person is in law a simple assault."

In *S. v. Collins,* 30 N. C., at p. 412, 413, the court below left it to the jury to say "Whether a knife two inches and a half long was a deadly weapon." On appeal this Court held this was so as a matter of law.

In *S. v. Huntley,* 91 N. C., at p. 620, is the following: "Then what is a deadly weapon? It must be an instrument used, or that may be used, for the purpose of offense or defense capable of producing death. Some weapons are *per se deadly;* others, owing to the manner in which they are used, become deadly. A gun, a pistol, or dirk-knife, is of itself deadly; a small pocket knife, a walking cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially, *if the party assailed should have comparatively less power than the assailant, or be helpless and feeble."* (Italics mine.)

In *S. v. Archbell,* 139 N. C., at p. 539, it is said: "An instrument which might be harmless upon a strong man, may become deadly when used upon a frail and delicate woman." *S. v. Beall,* 170 N. C., at p. 766; *S. v. Hefner,* 199 N. C., 778.

In *S. v. Smith,* 187 N. C., at p. 470, *Stacy, J.,* writing for a unanimous Court, said: *"Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. S. v. Craton,* 28 N. C., p. 179. *The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. S. v. Archbell,* 139 N. C., 537; *S. v. Sinclair,* 120 N. C., 603; *S. v. Norwood,* 115 N. C., 789." (Italics mine.)

Webster's New International Dictionary defines "handcuff" as follows: "A metal ringlike fastening which can be locked around the wrist, usually connected by a chain or bar with one on the other wrist." The Century Dictionary gives a picture of the metal handcuff with the key and defines it as follows: "A shackle or fastening for the hand consisting of a divided metal ring placed about and locked upon the wrist; a manacle. Handcuffs are used in pairs, one for each wrist, the two being connected by a short chain or jointed bar."

In the present case, the defendant's own testimony was to the effect that the doctor told defendant "to go easy with him for three or four days." "Although the doctor had told me he was mighty hot and very tender I put him in the *'sweat-box' with shackles on and the chain locked down to the staple on the floor."* He was left in this sweat-box all Friday night. On Saturday, 26 July, he was taken from the "dark cell." He had been in camp since Monday evening, 21 July, working in extremely hot weather. About the middle of Saturday, the same day he was "confined" in the sweat-box with another man, defendant found him lying with his face down. Defendant "unchained" him and poured some water on him. The prisoner Bellamy said: "It feels good." That night the prisoner died about 11:30 o'clock, a half hour after reaching the hospital they "took his temperature and it went to the top of the thermometer at 110 . . . he was unconscious."

Ed. Perry testified that when Bellamy, the prisoner, got to the wash basin that Saturday morning he tried to drink some water from the wash basin, no doubt caused by the overpowering thirst caused from his fever. *Defendant hit him on the nose with a pair of handcuffs.* The bruise found upon him was a scratched place across his nose 1½ inches long and ¾ of an inch wide. It is a matter of common knowledge that handcuffs are of metal, it is so defined in the dictionaries. Everybody who has had any experience in the courts or elsewhere knows what it is without it being produced on trial. In fact the defendant did not request the court below to charge that under the facts and circumstances of this case it was not a deadly weapon. From its use on a prisoner weakened by fever, shackled and manacled all night before and the other evidence of his depleted condition the judge in the court below thought from the circumstances of its use that it was a deadly weapon, and as was said by *Stacy, J.*, in the *Smith case, supra, any* instrument which is likely to produce death or *great bodily harm* under the *circumstances* of its use is *properly* denominated a *deadly weapon.*

The position of the main opinion in my judgment is technical in the extreme. The record of defendant's conduct and his own testimony shows reckless, inhuman, conduct to the prisoner—weakened by being manacled and shackled, and placed in the sweat-box and worked in the hot summer sun, and then struck by defendant with the handcuffs when seeking to quench his feverish thirst by even trying to drink out of a wash basin. In less than twelve hours after this assault the prisoner was dead, with a fever at 110. I think defendant has been rightly convicted by a jury of his own county.

Mr. Elihu Root, a great lawyer and statesman, said: "Every lawyer knows that the continued reversal of judgments, the sending of parties to a litigation to and fro between the trial courts and the appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession. It is a disgrace to our law and a discredit to our institutions." This statement is perhaps too radical, but it should be a warning.

The language in the dissenting opinion of *Stacy, C. J.*, in *S. v. Strickland, ante,* 630, is most applicable in the present case: "Even in criminal prosecutions, where, for obvious reasons, matters of procedure are required to be observed with greater particularity than in civil actions, bills and warrants are no longer subject to *quashal* 'by reason of any informality or refinement,' C. S., 4625. Many cases have been upheld in the face of far more grievous defects than the one here alleged. *S. v. Beal,* 199 N. C., 278; *Jennette v. Hovey,* 182 N. C., 30, 108 S. E., 301. . . . The case turns on a *Lilliputian* point made *Brobdingnagian.* That is all there is in it. Why debate it further? *Cui Bono?*"

STACY, C. J., concurs *quære de dubiis:* While not pressed on the argument, or debated on brief, it may be doubted whether a more fundamental question than all the rest, does not arise on the face of the record proper. It is this: Is a verdict of assault with a deadly weapon supported by a statutory indictment for murder which fails to allege that the homicide was committed by means of assault and battery or assault with a deadly weapon? This may be doubted. *In re McLeod,* 23 Idaho, 257; 43 L. R. A. (N. S.), 813; *Watson v. State,* 116 Ga., 607, 43 S. E., 32, 21 L. R. A. (N. S.), 1, and note; 31 C. J., 866; 14 R. C. L., 210.

It is not essential to a valid indictment for murder that the means used be set out in the bill. The abbreviated statutory form is permissible and sufficient. *S. v. Gilchrist,* 113 N. C., 673, 18 S. E., 319; *S. v. Covington,* 117 N. C., 834, 23 S. E., 337; *S. v. Matthews,* 142 N. C., 621, 55 S. E., 342. But it is a rule of universal observance in the administration of the criminal law that a defendant cannot be charged with one offense and convicted of another not included therein. *People v. Adams,* 52 Mich., 24; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6. If this were not so, pleas of former jeopardy, former conviction and former acquittal would vanish from the books. 8 R. C. L., 110.

True, it is provided by C. S., 4639 that "on the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding." And it has been said in a number of cases, notably *S. v. Williams,* 185 N. C., 685, 116 S. E., 736, *S. v. Smith,* 157 N. C., 578, 72 S. E., 853, *S. v. Fritz,* 133 N. C., 725, 45 S. E., 957, and *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473, that on an indictment for murder, the defendant may be convicted of any one of the three degrees of an unlawful homicide, to wit, murder in the first degree, murder in the second degree, or manslaughter, and even of an assault with a deadly weapon, or of a simple assault, "if the evidence shall warrant such finding," when he is not acquitted altogether. "It is as if all these counts were separately set out in the bill (for it includes all of them), *S. v. Gilchrist,* 113 N. C., 673." *S. v. Hunt, supra.* But in all of these cases, and others of like import, the observation is carefully made that, to warrant one of the lesser verdicts, assault with a deadly weapon or simple assault, the crime charged must include an assault against the person as an ingredient. *S. v. Fritz, supra; S. v. Lee,* 192 N. C., 225, 134 S. E., 458.

Again, it is provided by C. S., 4640 that "upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." But the lesser offense for which a conviction may be had on an indictment for a higher one, must either be included in the general charge of the greater, or the indictment must contain sufficient allegations to constitute a charge of the lesser. *Watson v. State, supra.* Indeed, a conviction may not be had for an assault on an indictment for murder when it appears that not the assault charged but another caused the death. This would be a fatal variance between the allegation and the proof. *S. v. Harbert, supra.*

In a case like the present, where it is sought to fall back upon the lesser offense, assault and battery or assault with a deadly weapon, in case the greater, murder or manslaughter, is not made out, it is not unreasonable to require that the indictment for murder be so drawn as necessarily to include an assault and battery, or assault with a deadly weapon, or that it contain a separate count to this effect. *Scott v. State,* 60 Miss., 268. The decisions which hold that it would be violative of a defendant's constitutional right to charge him with the commission of one crime and convict him of another and different one, are not at variance with this requirement, but are accordant therewith. *S. v. Wilkerson,* 164 N. C., 432, 79 S. E., 888.

The Constitution provides that in all criminal prosecutions every man has the right to be informed of the accusation against him, and that no person shall be put to answer any criminal charge, . . . but by indictment, presentment, or impeachment. Art. I, secs. 11 and 12. A defendant is entitled to be informed of the accusation against him, and to be tried accordingly. *S. v. Ray,* 92 N. C., 810; *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *S. v. Whedbee,* 152 N. C., 770, 67 S. E., 60. "These principles," said *Nash, C. J.,* in *S. v. Moss,* 47 N. C., 67, "are dear to every freeman; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be *rights* of the citizens of North Carolina, and ought to be vigilantly guarded."

On an indictment which charges only that the defendant did feloniously kill and slay the deceased, a conviction of assault with a deadly weapon cannot be sustained, unless an assault with a deadly weapon is perforce covered by the charge. *S. v. Vineyard,* 85 W. Va., 293, 101 S. E., 440. And if it be conceded that a charge of murder *ex vi termini* includes, as an ingredient, an assault against the person, would not a conviction of assault, on such indictment, necessarily be limited to the assault which contributed to the homicide? If not, may the defendant, under a charge of murder, be convicted of an assault against the person, of any character, committed within the period of the statute of limitations?

The point may be illustrated by the instant case. Conceding that the placing of Willie Bellamy in the dark cell was an assault against him, under the circumstances disclosed by the record, which contributed to his death, would not this be the assault covered by the bill, and not some other assault which neither caused nor contributed to his death?

Take another illustration: Two men engage in an affray in which each assaults the other with a deadly weapon, but neither is seriously injured. Months afterwards they meet again, one shoots the other and kills him. On an indictment for the murder, would it be permissible to convict the defendant of an assault committed in the affray?

Involuntary manslaughter may be committed without the deceased being assaulted, as for example, where a homicide occurs as a result of some negligent or culpable omission of duty. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669; *S. v. McIver,* 175 N. C., 761, 94 S. E., 682. Perhaps the most that can be said of the present indictment is, that it charges an offense of which assault with a deadly weapon may or may not be an ingredient. *S. v. Thomas,* 65 N. J. L., 598. It does not set out murder or manslaughter by assault, and it cannot be held to cover assault and battery, or assault with a deadly weapon, as an independent averment. *People v. Adams, supra.*

Of course, where the means used to commit the homicide is set out in the bill and this includes an assault with a deadly weapon, it is not likely that the question here debated would ever arise.

Nothing said in this opinion is in any way binding on the court. The question is not decided.

JUSTICES ADAMS, CLARKSON, CONNOR, and BROGDEN, while not inclined to debate an academic question, deem it not improper to say that upon the evidence appearing in the record the following instruction, which was given the jury in this case, is in their opinion free from error: "You may bring in either one of four verdicts as to the defendant Watkins, as you may find the facts to be from the evidence, under the law as given you by the court: First, manslaughter, assault with a deadly weapon, simple assault, or not guilty."

CLAUDE NANCE v. MERCHANTS FERTILIZER AND PHOSPHATE CO.

(Filed 29 April, 1931.)

1. **Trial D a—On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff.**

On a motion as of nonsuit the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be considered in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment thereof and every reasonable inference therefrom. C. S., 567.

2. **Waters and Water Courses C c—Evidence held sufficient to be submitted to jury on issue of actionable negligence in polluting creek.**

In an action against a fertilizer company to recover damages for the killing of plaintiff's hogs, evidence that defendant dumped chemical refuse from its plant on a slope draining into the waters of a creek which overflowed the plaintiff's pasture, with further testimony of experts that the ingredients of the dump were poisonous, and that mud from the plaintiff's pasture contained the same chemicals, and that the death of plaintiff's hogs was due to such poison, is *held:* sufficient to be submitted to the jury on the issue of defendant's actionable negligence.

3. **Appeal and Error J c—Where evidence supports finding that witness is expert the finding is conclusive on appeal.**

The findings of fact by the lower court in qualifying or allowing a witness to testify as an expert is conclusive on appeal when supported by evidence.

4. **Taxation I a—Failure to list personal property for taxation will not bar action against one negligently destroying it.**

The failure of the owner of personal property to list it for taxation does not deprive him of his right of action to recover damages from one who has negligently destroyed it. Michie Supplement to N. C. Code, sec. 2971 (185).

5. **Negligence A f—Where injury would not have resulted except for defendant's negligence, plea of "act of God" will not bar recovery.**

The defense of an "act of God" is not available in an action to recover damages for the negligent destruction of personal property when the defendant's act unites therewith as an efficient proximate cause in producing the result.

6. **Trial B e—Failure to charge jury not to consider evidence stricken out held not reversible error under facts of this case.**

Where the motion to strike out the answer of a witness to a question is allowed, reversible error will not be held on exception to the failure of the trial court to charge the jury not to consider it, there being no special request therefor, and the failure to give such instruction not being prejudicial.

7. Trial B c—Exception to admission of evidence will not be sustained where same evidence has been admitted without objection.

The admission of incompetent evidence will not be held for reversible error if it has theretofore been admitted without objection.

APPEAL by defendant from *Harwood, Special Judge,* and a jury, at September Term, 1930, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff, a negro, against the defendant to recover damages. The allegations of the complaint are to the effect: That plaintiff was the owner of 36 fine Hampshire and Poland China Tamworth hogs. That he had these hogs in a pasture on the west bank of Stewart's Creek, near the city of Charlotte, N. C. That the defendant owns and operates a fertilizer plant near said creek, about ¾ of a mile above plaintiff's pasture. That the natural slope and drain from defendant's plant was into said creek. That defendant carelessly and negligently caused and allowed the chemical and mineral refuse from the plant to be dumped, piled and accumulate on the border and brink and down the sloping banks of and in the immediate drains to the creek, and in allowing fluids to drain from its plant into the running stream; and that the defendant company, in this manner and by its wilful, negligent, wanton and reckless acts and omissions in causing, allowing and permitting the alleged condition, negligently, recklessly and unlawfully poisoned and polluted the creek which overflowed in the plaintiff's pasture and caused the said damages to the plaintiff. That in February, 1928, heavy or protracted rains prevailed, which caused the creek to overflow and deposit and leave water in the holes and low places in the plaintiff's hog pasture in which some of the plaintiff's hogs wallowed and drank water and thereafter became sick and died; that during the month of November, 1928, a like condition prevailed as that in February, 1928, followed by the dying of other hogs of the plaintiff, bringing the total number of hogs which became sick and died after drinking the water deposited and left in plaintiff's pasture, to 36. That the plaintiff is informed and believes, and so alleges, that the waste and refuse matter and liquid dumped and allowed by the defendant company to accumulate at and below its plant and to drain from its plant, contains foreign and poisonous substances which is destructive to animal life and that the natural drains and seepage from the land above, the liquid wastes from the defendant's acid plant together with the rains in or about February and November, 1928, washed and carried down the said stream from the defendant's plant into the plaintiff's pasture, certain acids and poisons, and that said acid and poisons killed the plaintiff's 36 hogs which were worth about $1,200.

The material allegations of the complaint were denied by the defendant.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were the hogs of the plaintiff killed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court, these and the necessary facts will be considered in the opinion.

Uhlman S. Alexander and S. E. W. Kenny for plaintiff.
Fred W. Bynum and C. H. Gover for defendant.

CLARKSON, J. The defendant at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we see no error. It is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence of plaintiff on the trial below fully sustained the allegations of the complaint. The evidence was to the effect: (1) That 36 of plaintiff's hogs became sick and died in his pasture about 50 feet from Stewart's Creek, the first group of 20 in February, 1928, and the second group of 16 in October of the same year. That on both occasions water from the creek overflowed and got in the holes in the pasture, and soon thereafter the hogs drank the water and got thirsty and down, would not eat and became sick and died. Prior to drinking the water they were in good health and had no disease, the younger hogs died first. Some of the hogs were cut open "their entrails were eaten just like leaves eaten by worms." "The entrails looked like they were scalded and full of holes." They did not have cholera. "The hogs that did not drink that water did not die." (2) In searching for the cause, it was discovered that in Stewart's Creek, below defendant's plant, there was no animal life in the stream, above defendant's plant in the stream were fish and tadpoles. Before defendant's plant was located there "some pretty big perch were caught in the creek, but there are none now, there is no animal life in the creek below the plant now, there are some small fish in the creek above the plant." At defendant's plant, on the water shed of the creek, the ground sloped to the creek and there was a slag pile about 150 feet from the creek. The ground slopes gradually from the slag pile to the creek. "Water drains from slag pile through a ditch to the creek." Stewart's Creek is about 7 feet wide in dry weather, 12 inches deep and about 300 feet from defendant's plant. Some of the slag and chemicals put there by defendant from the pile were obtained and some water out of Stewart's Creek opposite the pasture, and also some mud out of the water holes in the hog pasture. The stuff emptied on the slag pile was yellow sulphur and nitre mixed together, it came from the acid chamber of defendant's plant. (3) Some of the slag and chemical from defendant's pile, etc., taken were analyzed by Dr. H. P. Arbuckle and his associate Dr. O. J. Theis, Jr., Dr. Arbuckle being Professor of Chemistry at Davidson College and Dr. Theis associate. Both found by the court or admitted to be expert chemists. *Liles v. Pickett Mills,* 197 N. C., 722. Where there is any evidence to sustain such finding, it is conclusive on appeal. *S. v. Combs, ante,* 671. Dr. Arbuckle's testimony corroborated by Dr. Theis was to the effect that "The principal contents is sodium acid sulphate, which is a substance left in the manufacture of sulphuric acid by treating sodium nitrate with sulphuric acid; if you use sufficient sodium nitrate to equalize the acid it will make sodium sulphate. This material in the box is about 40% sulphuric acid. Sulphuric acid is one of our most corrosive acids and attacks tissue, and wood; in its diluted form it will rank as a poisonous substance and would seriously affect tissues if constantly subjected to its action. Sulphuric acid taken internally in large quantities would be poisonous, bring about serious results, even diluted will seriously affect the tissues of the body, characterized by producing extreme thirst and I suppose there would be perforation of the intestines and other organs of the body. (Defendant moved to strike the answer out. It was allowed but jury were not cautioned to disregard this evidence and defendant excepted.) I have had considerable experience with livestock; have never given any sulphuric acid to hogs and stock and could not give an opinion. Do know it would be injurious to tissues, mucous linings. Q. Would it cause death if taken in sufficient quantities? A. In my opinion it would, sulphuric acid is ranked as one of our poisons. I analyzed the contents of the two cans shown me; when opened they showed considerable pressure of gas and they had holes which indicated action of acid upon the iron in the cans; the water in one of the cans shows large quantities of sodium acid sulphate and is the same as the mud in the cigar box."

There was ample evidence to be submitted to the jury and the court below was correct in overruling defendant's motions for judgment as in case of nonsuit. The evidence was circumstantial, the probative force was for them—not for us.

In *Rhyne v. Mfg. Co.,* 182 N. C., 489, the evidence was to the effect: Where a cotton mill and settlement had diverted the natural flow of water on its lands containing sewage and filth from its mill upon the lands of the adjoining lower proprietor so as to pollute his springs and cause him to cease to use it for his cattle and his land for pasture, a permanent injunction will lie. At p. 493, the Court said: "The defendant must attain its ends, advance its interests, or serve its convenience, by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others—'*Sic utere tuo, ut alienum non laedas.*'" *Rouse v. Kinston,* 188 N. C., 1; *Finger v. Spinning Co.,* 190 N. C., 74; *Cook v. Mebane,* 191 N. C., 1; *Moses v. Morganton,* 192 N. C., 102; *S. c.,* 195 N. C., 92.

In *Masten v. Texas Co.,* 194 N. C., p. 540, the evidence was to the effect that a tank to supply large quantities of gasoline had been put into the ground by the defendant on property adjacent to that of plaintiff, and its use thus caused the seepage of gasoline into the ground in such quantities as to destroy the use of plaintiff's well of water used at his dwelling for drinking purposes, by entering into the underground water channels which gave him his water supply. The evidence was held in that case sufficient to take the issue to the jury upon defendant's motion as of nonsuit. At p. 542, the Court said: "One may no more pollute a subterranean stream than a surface stream. A person has no right to befoul, corrupt or poison underground water so that when it reaches his neighbor's land it will be unfit for use by either man or beast. The same principle applies to noxious odors. This is good morals as well as good law." Farnham Water & Water Rights, Vol. 2, sec. 446.

The defendant contends that the following questions are involved in this appeal:

(1) Can a party invoke the aid of the courts of this State for the recovery of damages to property when his conduct in connection therewith is made criminal by our statutes? The question goes too far from the evidence, but, under the facts and circumstances of this case, we think so. See *Vinegar Co. v. Hawn,* 149 N. C., p. 357.

1929 Supplement to the N. C. Code of 1927 (Michie), sec. 2971(185) is as follows: "If any person, firm or corporation whose duty it is to list any personal property whatsoever for taxation, shall fail, refuse or neglect to list same, shall remove or conceal same, or cause same to be removed or concealed, or shall aid or abet in removing or concealing property that should be listed, such person, firm or corporation shall be guilty of a misdemeanor."

In *S. v. Snuggs,* 85 N. C., at p. 543, is the following: "The statute not only creates the offense but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. I Russel on Crimes, 49; *S. v. Loftin,* 2 Dev. & Bat., 31." *S. v. R. R.,* 168 N. C., 103; *S. v. Berry,* 169 N. C., 371; *Walker v. Odom,* 185 N. C., at p. 558.

In *Wooten v. Bell,* 196 N. C., at p. 657, in regard to the statute evading the payment of taxes on bonds, notes, etc., we quote: "In *Corey v. Hooker,* 171 N. C., at p. 232, it is said: 'In any event, defendants would have the right to pay the taxes into court, as they have offered to do if liable therefor.' "

The evidence was to the effect that plaintiff did not return his hogs for taxation. There is no reason why this should bar him from recovering in a civil action for actionable negligence.

(2) Can a party recover damages for injuries to his property when the proximate cause of his damages is an "Act of God?" We do not think this question is borne out by the facts on the record.

The evidence is to the effect: "Water overflowed from the creek and got in the holes and my hogs would drink that water. . . . We had a big rain in February and August, 1928. . . . I did not observe any water in the holes till high water came. . . . (A witness testified) I remember a big rain and the creek overflowed in February, 1928; don't recall ever seeing it overflow like this before but have seen it do that once since; I don't live on this creek."

In the case of *Lawrence v. Yadkin River Power Co.,* 190 N. C., at p. 670, the following instruction of the lower court was held to be a correct statement of law: "Where injuries result from an act of God, no one is responsible, whether there is any connection between an act of an individual or a corporation, and the act of God, but where there is a concurring responsibility between the act of an individual and an act of God, and where the concurring responsibility of the individual continues up to and is an efficient cause in producing damage, then it is said to be actionable negligence."

In 22 R. C. L., part sec. 17, at p. 131, we find: "When negligence of a responsible person concurs with a flood or storm or other so-called 'act of God' in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences if the injury would not have happened but for his failure to exercise care." *Luttrell v. Hardin,* 193 N. C., at p. 272.

In *Winchester v. Byers,* 196 N. C., at p. 385, is the following: "If the evidence justified a charge on unforeseen or unprecedented rain fall, no prayer was requested by defendant."

(3) Should incompetent evidence be admitted and then later stricken out and the jury not cautioned to disregard it?

This is in reference to Dr. Arbuckle's testimony: "Sulphuric acid taken internally in large quantities would be poisonous, bring about serious results, even diluted will seriously affect the tissues of the body, characterized by producing extreme thirst and I suppose there would be perforation of the intestines and other organs of the body." The defendant moved to strike the answer out. It was allowed, but complaint is made that the court below did not so instruct the jury. The defendant did not request a prayer to that effect. *Gilland v. Stone Co.,* 189 N. C., at p. 785; *Luttrell v. Hardin, supra,* at p. 266.

In *McAllister v. McAllister,* 34 N. C., 184, *Ruffin, J.,* said: "It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury or by giving such explanations of an error as will prevent it from misleading a jury." *S. v. Stewart,* 189 N. C., at p. 345.

On the present record it is not necessary to pass on the competency of this evidence, it was given by an expert chemist, and in fact perhaps is a matter of common knowledge.

(4) Should a chemist be permitted to give expert testimony in the realm of the surgeon? We think this question too broad to cover the evidence in this case. If not, the exception and assignment of error has been waived.

A hypothetical question was propounded to Dr. Arbuckle, an expert chemist, by plaintiff, and in this question every aspect of the case was set forth. This question was answered favorably to plaintiff without objection on the part of defendant.

In *Shelton v. R. R.,* 193 N. C., at p. 674, citing numerous authorities, the following observation is made: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost."

The case was ably argued and the briefs helpful. On the whole record, we can find no prejudicial or reversible error.

No error.

CAROLINA DISCOUNT CORPORATION v. MARTIN B. M. BUTLER.

(Filed 29 April, 1931.)

1. **Pleadings A c—Notice of motion to amend after time for filing answer has expired must be given defendant.**

   Unless a verbal or written motion to amend a complaint after time for filing answer has expired be made at the trial term of the action, previous notice of ten days must be given the defendant unless the time is shortened by the court, and an order allowing the amendment to be made, entered without such notice, is irregular. C. S., 545, 912.

2. **Judgments K c — Irregularity in allowance of amendment without notice held waived by defendant's failure to object thereto in apt time.**

   Where the clerk of the court, after time for filing answer has expired, has allowed the plaintiff to amend his complaint to allege fraud so that an execution against the person of the defendant might be issued in the event of judgment in plaintiff's favor, and the required notice of the motion to be allowed to amend has not been given the defendant, but the amended complaint has been served on the defendant, his failure to file answer or to object to the irregularity until four months after judgment when execution against his person had been issued, is a waiver of the irregularity in the proceedings, and his motion to set aside the judgment as a matter of law will be denied.

CIVIL ACTION, before *Daniels, J.*, at December Term, 1930, of NEW HANOVER.

On 24 June, 1929, the plaintiff issued a summons against the defendant and said summons and the complaint attached thereto was duly served on 27 June, 1929. The complaint alleged that the defendant was indebted to the plaintiff in the sum of $687.07 with interest, and that said indebtedness grew out of an automobile transaction. Without notice to the defendant, the plaintiff applied to the deputy clerk of the Superior Court on 12 August, 1929, for permission to amend the complaint by inserting therein an allegation of fraud on the part of defendant in contracting the indebtedness sued for in the complaint. This order was granted, but the order and amended complaint was lost in the clerk's office and never served upon the defendant. Thereafter, on 16 June, 1930, the plaintiff, without notice to the defendant, obtained an order from the assistant clerk stating that the former order and amended complaint be filed and served on the defendant, and that the cause be tried on the complaint, the substituted amended complaint and such pleadings as the defendant may file. This order and amended complaint was duly served on 20 June, 1930.

The defendant made no appearance and filed no answer, and thereafter at the October Term, 1930, the cause was submitted to the jury upon issues of indebtedness and fraud, and both said issues were answered in favor of plaintiff. Judgment was entered upon the verdict, and on 6 November, 1930, execution was duly issued.

Thereafter, the defendant made a motion to set aside the judgment at the December Term, 1930. After a hearing the following judgment was entered:

"This cause coming on to be heard and being heard in Chambers before his Honor, F. A. Daniels, upon motion of the defendant to set aside the judgment heretofore entered against the person of the defendant at the October Term, 1930, of the Superior Court of New Hanover County the court finds the following to be the facts:

This action was commenced in the Superior Court of New Hanover County by the filing of a duly verified complaint and the issuance of summons on 24 June, 1929. Said summons and complaint were duly served upon the defendant on 27 June, 1929, by leaving a copy of said summons and complaint with defendant. The complaint stated a cause of action for breach of contract against the defendant and asked for judgment in the sum of $687.07, with interest from 10 October, 1928.

On 12 August, 1929, no answer or other pleading to the original complaint having been filed the plaintiff without notice, written or verbal, asked leave of the clerk to file an amended complaint reiterating the allegations of the first complaint and fully setting up therein fraud on the part of the defendant in contracting the indebtedness sued for in the first complaint. The amendment to the complaint was allowed and an order to that effect signed by M. J. Shuffler, assistant clerk of the Superior Court of New Hanover County. This amended complaint was lost or mislaid in the office of the clerk of the Superior Court and the record does not show that any notice of request to amend the complaint was ever served on the defendant and the court finds that no such notice was served.

In the spring of 1930, plaintiff's attorney, in looking over papers preparatory to calendaring the case for trial discovered that the order allowing filing of the amended complaint and the amended complaint were not in the papers. Thereupon, the plaintiff applied to the court without notice, written or verbal, for leave to substitute a duly verified copy of amended complaint and to have same served on the defendant. Pursuant to this request and without notice to defendant on 16 June, 1930, an order signed by the assistant clerk of the Superior Court, finding as a fact that an order allowing the filing of an amended complaint and the filing of said amended complaint had been signed and allowed on 12 June, 1929, and that the duly signed and filed order and amended complaint had been lost or mislaid and could not be found, authorized the filing of a duly verified substitute amended complaint.

This verified complaint, reciting on its face that it was filed under leave of court duly had, was duly served on the defendant on 20 June, 1930, and specifically and fully charged the defendant with fraud in contracting the debt and asked for judgment against the person and a like execution in the event execution against the property was returned unsatisfied.

The defendant filed no answer or other pleading to either the original complaint, the amended complaint or the substituted amended complaint and made no appearance at the trial of the case. The court finds that the allegations of the amended complaint were sufficient to put the defendant on notice that he was charged with fraud in contracting the indebtedness. The court also finds that the defendant had ample time to plead to the amended complaint before the trial of the case.

The cause was duly calendared for trial at the October Term, 1930, of the Superior Court of New Hanover County commencing 13 October, 1930. The case came on for hearing before Daniels, judge, and a jury, on 20 October, 1930. Evidence was introduced by the plaintiff sufficient to go to the jury upon the question of breach of contract and fraud in contracting the indebtedness. Upon the close of the evidence and after charge of the court the case was submitted to the jury upon the two following issues:

1. In what amount, if any, is the defendant indebted to the plaintiff?
2. Was the defendant guilty of fraud in contracting said indebtedness?

The jury took the case and returned a verdict answering the first issue $687.07, with interest from 10 October, 1928—and the second issue, Yes.

Thereupon, judgment was tendered and signed in accordance with said verdict. No motion to set aside the verdict or appeal from the judgment was taken by the defendant. After the adjournment of the court plaintiff issued execution against the property of the defendant and same was returned unsatisfied. Thereupon, plaintiff's attorney on 7 November, 1930, wrote defendant that the judgment in the case authorized execution against the person and that same would be issued unless the judgment was complied with.

As a result of this letter the defendant, for the first and only time, appeared in court on 10 November, 1930, for the purpose of moving to set aside said judgment on the ground that the same was irregular because no notice of application to file an amended complaint had been served on him and that he was taken by surprise and excusable neglect.

Defendant filed affidavits setting up a meritorious defense, and the court finds that, for the purpose of this motion, the defendant has a meritorious defense. The court further finds that the amended pleading was not filed for the purpose of delay and that the defendant did not lose the benefit of a term for which the cause might have been docketed. The court further finds that there was no excusable neglect and that the defendant was not taken by surprise. The court further finds that the deputy clerk of the Superior Court who signed the orders and allowed the filing of the amended complaint is beyond the jurisdiction of the court and by reason of the fact that his whereabouts are unknown cannot be reached by process of the court.

Upon the foregoing facts it is ordered and adjudged, as a matter of law, that the judgment heretofore entered against the person of the defendant be vacated and set aside upon the ground that the same was irregular in that no notice of application to file an amended complaint was served on the defendant and that the service of the duly verified amended complaint on the defendant did not cure, nor did defendant's failure to answer waive, this irregularity.

By consent of counsel, this judgment is signed at December Term, 1930, and the facts found by the court, as hereinabove set out, and this judgment shall constitute the case on appeal."

From the foregoing judgment setting aside the judgment of the Superior Court at the October Term, 1930, the plaintiff appealed.

Cyrus D. Hogue for plaintiff.
No counsel for defendant.

BROGDEN, J. C. S., 545 provides for amendments to pleadings. In the case at bar no effort was made to amend the pleadings before the time for answering expired. After the time for answering has expired it has been the uniform practice to apply to the court for permission to amend. This application may be oral or written, but notice of such motion is required unless made during a term of court at which the action stands for trial. When such motion is made at the trial term the parties are presumed to be present, and hence notice is unnecessary.

C. S., 912, provides that the notice of a motion must be served ten days before the time appointed for the hearing unless the court or judge by order shall fix a shorter time. The trial judge finds as a fact that on 20 June, 1930, a verified complaint "reciting on its face that it was filed under leave of court duly had, was duly served on the defendant on 20 June, 1930, and specifically and fully charged the defendant with fraud in contracting the debt and asked for a judgment against the person and a like execution in the event execution against the property was returned unsatisfied." The court further found that the allegations in the amended complaint "were sufficient to put the defendant on notice that he was charged with fraud in contracting the indebtedness." The court further found that the "amended pleading was not filed for the purpose of delay, and that there was no excusable neglect, and that the defendant was not taken by surprise." It was also found that the defendant had a meritorious defense.

If it be conceded that the order of 12 August, 1929, permitting the plaintiff to amend the complaint and charge fraud, was irregularly made because no notice was given, still it is manifest that when the amended complaint was actually served on the defendant on 20 June, 1930, he was fully apprised of the nature of the suit. Notwithstanding, he made no appearance and filed no answer for a period of four months, and until execution was served upon him by the sheriff. Then for the first time he lodged a motion to set aside the judgment.

Upon the facts found by the trial judge, it is obvious that the defendant waived the irregularity complained of.

The controlling principle of law was thus stated in *Ins. Co. v. Scott,* 136 N. C., 157: "Equitable relief will not be granted to a party against a judgment because of good ground (even) of defense of which he was ignorant till after judgment rendered, unless he shows that by the exercise of reasonable diligence he could not have discovered such defense in time for the trial, or that he was prevented from the exercise of such diligence by fraud or surprise on the part of the opposing party, or by accident or mistake unmixed with the negligence on his part."

So, in the case at bar, the defendant had a good defense, but he never attempted to assert it for more than four months after notice of the charge of fraud laid against him; nor does it appear that he employed an attorney or took any steps whatever to protect his rights. The Court is, therefore, of the opinion that the trial judge was without power to set aside the judgment as a matter of law. McIntosh North Carolina Practice & Procedure, 520-21; *Jones v. Jones,* 173 N. C., 279; *McLaughlin v. R. R.,* 174 N. C., 182.

Reversed.

STATE v. JAKE VANDERBURG.

(Filed 29 April, 1931.)

1. **Concealed Weapons A a—Possession of pistol on premises of another is not alone sufficient for conviction of violation of C. S., 4410.**

   The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of C. S., 4410, although the statute makes such possession prima facie evidence of the concealment thereof.

2. **Assault B b—In this case held: elements of offense denounced in C. S., 4231, were not sufficiently explained to jury.**

In this prosecution for an assault in a secret manner with intent to kill in violation of C. S., 4213: *Held,* the trial court failed to sufficiently explain to the jury the several elements of the offense, and defendant is entitled to a new trial.

APPEAL by defendant from judgment pronounced at the October Term, 1930, of GASTON. New trial.

There were two bills of indictment against the defendant, in the first of which he was charged with an assault in a secret manner with intent to kill, in violation of C. S., 4213, and in the second with carrying a concealed weapon, in violation of C. S., 4410. The record proper shows that the jury returned a general verdict of guilty in both cases. The case on appeal states that the jury returned a verdict of guilty of carrying a concealed weapon, and assault with a deadly weapon.

The judgment rendered upon conviction under the first indictment was imprisonment of the defendant in the county jail for a period of two years to be worked on the public roads of the county, and in the second indictment, a like sentence for a period of one year. The record shows that the two judgments are not concurrent, the sentence in the second to begin at the expiration of the sentence in the first.

From the judgment pronounced the defendant appealed to the Supreme Court upon assigned error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

E. R. Warren and George W. Wilson for defendant.

PER CURIAM. There was evidence tending to show that the defendant, while off his own premises had a pistol concealed about his person in breach of the statute. He excepted to the following portion of the instructions given the jury respecting the question of his guilt: "If the evidence is to be believed, a woman was in possession of the house, that she had it rented, and that he was not on his own premises, and he had no right to carry a pistol upon it; and if you find beyond a reasonable doubt that he had a pistol concealed on his person, or if you find beyond a reasonable doubt that he was in possession of a pistol on that occasion and find it beyond a reasonable doubt, then it would be your duty to convict."

Section 4410 provides that if any one not being on his own land shall have about his person a deadly weapon, such possession shall be prima facie evidence of the concealment thereof; but the bare possession of a pistol by a person not on his own premises does not necessarily constitute a breach of the statute. This instruction entitled the defendant to a new trial on this indictment.

With respect to the assault, the record discloses the following instruction: "This woman testified that he came out there and told her to get out of there by a certain time and drew his pistol on her and told her that if she did not get out at that certain time he would feed her a couple of these, meaning cartridges from the pistol. The little girl says he drew the pistol. Mrs. Green illustrates how he drew it and the little girl did the same thing; that he drew it out of his pocket and presented it to her mother, and she illustrates how he did it. If you find this to be true, he would be guilty at least of carrying a concealed weapon, and if he made a threat to kill her, then he would be guilty of assault with intent to kill, assault with deadly weapon."

We do not think that the several elements of the offense denounced in C. S., 4213 were sufficiently explained to the jury in view of the general verdict appearing in the record proper.

New trial.

STATE v. TOM MARION.

(Filed 6 May, 1931.)

1. **Criminal Law L b—Statutory requirements for affidavit for appeal in forma pauperis must be strictly complied with.**

   In order that the Supreme Court may have jurisdiction of an appeal *in forma pauperis* in a criminal action it is required that the application for leave to appeal be supported by an affidavit of the appellant showing that he is wholly unable to give the security required by C. S., 4650; that he is advised by counsel that he has reasonable cause for appeal, and that the application is made in good faith, and where any of these three statutory requirements have not been complied with the appeal will be dismissed. C. S., 4651.

2. **Same—In this case defect in affidavit was cured and Supreme Court acquired jurisdiction.**

   Where it appears from the record on appeal in a criminal case that the affidavit of the appellant supporting his application to the trial judge for leave to appeal *in forma pauperis* failed to allege that the application was made in good faith, but it is made to appear that the defect has been cured by amendment, the Supreme Court acquires jurisdiction to hear and determine the appeal.

3. **Criminal Law I j—Upon motion as of nonsuit the evidence is to be considered in the light most favorable to the State.**

   Upon motion as of nonsuit in a criminal action the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. C. S., 4643.

4. **Homicide G a—Evidence of defendant's guilt of murder held sufficient to be submitted to the jury.**

While evidence of motive and an opportunity alone may not be sufficient to convict the defendant on trial for a homicide, the question of his guilt should be submitted to the jury where motive and opportunity are shown and his own testimony and declarations are contradictory of the natural evidence appearing at the time and place of the crime, and reasonably bears out the inference that he was endeavoring to fix the crime on some one else, not identified, in order to exculpate himself, and that he was the only person present at the time of its commission.

APPEAL by defendant from *Sink, Special Judge,* at November Term, 1930, of DAVIDSON. No error.

This is a criminal action in which the defendant was tried on an indictment for the murder of his wife, Susie Marion. There was a verdict that defendant is guilty of murder in the second degree.

From judgment that defendant be confined in the State's prison for a term of not less than twenty nor more than thirty years, he appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

L. B. Williams and Gaston A. Johnson for the defendant.

CONNOR, J. The defendant in this action, having been convicted of a criminal offense in the Superior Court of Davidson County, appealed from the judgment of said court, without giving adequate security to abide by the sentence, judgment or decree of this Court, as required by statute, C. S., 4650. He relied upon an order made by the trial judge allowing him to appeal without giving such security, C. S., 4652. This order was made on the application of the defendant to the trial judge. C. S., 4651. The affidavit appearing in the record in support of the application, is, however, fatally defective, for that it does not appear therein that the application was made in good faith. It has been uniformly held by this Court, in an unbroken line of authoritative decisions, that when the defendant in a criminal action has been convicted in the Superior Court, and has appealed from the judgment of said court to this Court, without giving security as required by C. S., 4650, strict compliance with all the requirements of C. S., 4651, is essential; otherwise, this Court acquires no jurisdiction of the appeal. The affidavit filed by the defendant in support of his application for an order permitting him to appeal without giving security must show (1) that the defendant is wholly unable to give security for costs; (2) that he is advised by counsel that he has reasonable cause for the appeal; and (3) that the application is in good faith. These are the requirements of the statute, and must be complied with. *S. v. Moore,* 93 N. C., 500. In *S. v. Martin,* 172 N. C., 977, 90 S. E., 502, it is said: "It has been repeatedly held that an order permitting such appeal in a criminal case is fatally defective if the affidavit does not comply with the statute, because the requirement is jurisdictional and unless the affidavit is sufficient, the appeal must be dismissed as a matter of right and not of discretion. See *S. v. Brumfield,* 198 N. C., 613, 152 S. E., 926; *S. v. Martin,* 172 N. C., 977, 90 S. E., 502; *S. v. Smith,* 152 N. C., 842, 67 S. E., 965; *S. v. Atkinson,* 141 N. C., 734, 53 S. E., 228; *S. v. Bramble,* 121 N. C., 603, 28 S. E., 269. In *S. v. Duncan,* 107 N. C., 818, 12 S. E., 382, it is said that in such cases, where the affidavit is not sufficient, it is the right of the State to have the appeal dismissed.

When the motion of the State in the instant case that the appeal be dismissed for that it does not appear in the affidavit in the record that the application for leave to appeal in *forma pauperis* was made in good faith, was called for hearing in this Court, the defendant moved for leave to file a certificate of the clerk of the Superior Court that the affidavit had been amended, curing the defect. This motion was not resisted by the Attorney-General, and was allowed by the Court. A certificate signed by the clerk of the Superior Court of Davidson County, showing that the affidavit had been amended, and as amended fully complies with the requirements of the statute, has been filed in this Court. For this reason, the motion of the State is denied. The defect in the record having been cured, this Court now has jurisdiction of the appeal.

The sole question presented for decision by defendant's appeal is whether there was error of law in the refusal of the trial court to allow his motion made at the conclusion of all the evidence that the action be dismissed as of nonsuit, for that the evidence introduced at the trial was not sufficient to sustain a verdict that the defendant is guilty as charged in the indictment. C. S., 4643. The motion was first made when the State had produced its evidence and rested its case. It was then denied, and defendant excepted. The defendant introduced his evidence as allowed by the statute and at the conclusion of all the evidence renewed his motion. It was again denied, and defendant excepted. This latter exception, on which the only assignment of error relied on by defendant in this Court, is based, requires a consideration of the entire evidence in order to determine whether or not there was error in the trial as contended by defendant on his appeal to this Court. *S. v. Earp,* 196

N. C., 164, 145 S. E., 23; *S. v. Pasour,* 183 N. C., 793, 111 S. E., 779; *S. v. Brinkley,* 183 N. C., 720, 110 S. E., 783.

The practice firmly established in this jurisdiction, and the rule uniformly applied by this Court, in considering and deciding the question presented by this appeal, have been recently restated by *Stacy, C. J.,* in *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. It is there said: "The practice is now so firmly established as to admit of no questioning, that, on a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. And further, the general rule is, that, if there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise, not, for short of this, the judge should direct a nonsuit, or an acquittal in a criminal prosecution. *S. v. Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644."

The evidence introduced at the trial of this action fully supports the contentions of the State that the deceased, Susie Marion, wife of the defendant, was killed and murdered, as charged in the indictment, some time between about 6:30 and 7:30 p.m., on 4 October, 1930; that the defendant, her husband, was with her at the time of the murder; that the murder was committed while the deceased was in defendant's automobile, in which she had left their home with the defendant; and that her life was insured for the benefit of the defendant in the sum of $1,000, or in the event her death was the result of an accident, in the sum of $2,000. This evidence, which was not contradicted in any respect, was sufficient to show that the defendant had an opportunity to commit the murder. That he had a motive to do so, was a reasonable inference from the fact that her life was insured for his benefit. This evidence alone might not have been sufficient to justify an inference that the defendant murdered his wife, but there was further evidence to the effect that within a short time after the murder, not to exceed an hour, the defendant made statements to witnesses for both the State and the defendant, tending to show that his wife was shot and killed by a negro man, who came up to the automobile, while it was standing on the road between the city of High Point and the town of Thomasville, and after robbing the defendant, shot and killed his wife, while she was in the automobile. The defendant so testified at the trial, as a witness in his own behalf. In these statements and also in his testimony, the defendant described with great particularity the scene of the murder, and the conduct of the negro, who, he said, shot and killed his wife. If these statements and this testimony were true, they would have been necessarily corroborated by certain physical facts which would have been readily apparent when the witnesses for the State, in the company of the defendant, visited the alleged scene of the murder within less than two hours after the defendant returned to his home with the dead body of his wife in the automobile beside him. The uncontradicted evidence shows that none of these facts were discovered after a diligent search by the witnesses under the immediate personal direction of the defendant. The statements made by the defendant to the witnesses and his testimony as a witness at the trial were contradicted in material matters by the evidence as to the location of the fatal wound on the body of the deceased, and also by the location of the bullet in the back of the seat of the automobile.

This in addition to the evidence showing that defendant had the opportunity and a motive to commit the murder, there was evidence tending to show that his statements to the witnesses, and his testimony at the trial, were false. A reasonable inference could be drawn by the jury that defendant had made the false statements and had given the false testimony for the purpose of exculpating himself. If the defendant's contention that his wife was shot and killed by a negro was not sustained by the evidence, then there was no evidence tending to show that any person except the defendant was with his wife, when she was shot and killed. There was evidence tending to show that the deceased was murdered at a place and under circumstances different from those which the defendant's statements and testimony tended to show.

The evidence was sufficient to establish facts from which an inference could be reasonably drawn by the jury that the defendant shot and killed his wife. The evidence was therefore properly submitted to the jury, and there was no error of law in the refusal of the court to allow the motion of the defendant that the action be dismissed as of nonsuit. The judgment is affirmed.

No error.

J. R. SMALL v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 6 May, 1931.)

1. **Electricity A c—Evidence that defendant left wires in dangerous condition resulting in damage held sufficient.**

In this action damages were sought of an electrical power company furnishing electricity for hire, the evidence tended to show that, in temporarily disconnecting plaintiff's service at his request, the power company was negligent in leaving the wires after removing the meter, which resulted in the destruction of plaintiff's house by fire, and also evidence in behalf of the defendant that it was not negligent: *Held*, the issue was properly submitted to the jury upon authority of *Starr v. Telephone Co.*, 156 N. C., 435, and other like cases cited.

2. **Electricity A a—Electricity requires care of ordinarily prudent man under circumstances, considering inherent danger of the force.**

The degree of care required of a person in any instance varies according to the facts and circumstances under the uniform rule of that degree of care which an ordinarily prudent man would exercise under like conditions, and the degree of care required of those furnishing electricity for hire is that degree of care which is commensurate with the dangerous quality of the force, and comes within the rule of that care which reasonably should be exercised by an ordinarily prudent man.

APPEAL by defendant from *Schenck, J.,* at October Civil Term, 1930, of GUILFORD.

Civil action to recover damages for destruction by fire of plaintiff's house alleged to have been caused by the negligence of the defendant in failing to take necessary precautions to protect the same when disconnecting electric service wires.

Plaintiff was the owner of a dwelling-house in Gold Hill, Rowan County, equipped for electric light service which the defendant furnished. In May, 1929, the plaintiff moved out of his house, left the same vacant, paid the defendant its bill for electric current, and asked that the service be discontinued, meter taken out, wires disconnected, etc.

It is in evidence that the defendant failed to take the usual and customary precautions in disconnecting its wires, in that, ends of live wires were left dangling inside the house near a wooden ceiling, whereas proper prudence and precaution required that such wires be cut outside the house so as to prevent the current from going inside. The defendant's evidence, on the other hand, was to the effect that the wires had been properly and safely disconnected.

Plaintiff's evidence further tends to show that during the evening of 29 August, 1929, a severe electrical storm visited the community of Gold Hill, during which lightning struck the defendant's transmission lines, burnt out the transformer, caused heavy currents of electricity to be carried over the wires into a number of houses, including the plaintiff's, which was set on fire. The defendant's evidence, however, tends to prove that the fire arose from other causes.

Plaintiff contends that his house was destroyed because of the defective condition in which the defendant left its wires when it took out the meter and disconnected the electric service wires.

The jury answered the issue of negligence in favor of the plaintiff, and fixed the damages at $1,500. Judgment accordingly.

The defendant appeals, relying chiefly upon its demurrer to the evidence and motion for judgment as in case of nonsuit.

Hines, Kelly & Boren for plaintiff.
W. S. O'B. Robinson, Jr., and R. M. Robinson for defendant.

STACY, C. J. The case was properly submitted to the jury on authority of what was said in *Starr v. Tel. Co.*, 156 N. C., 435, 72 S. E., 484; *Lawrence v. Power Co.*, 190 N. C., 664, 130 S. E., 735; *Carpenter v. Power Co.*, 191 N. C., 130, 131 S. E., 400, *McAllister v. Pryor*, 187 N. C., 832, 123 S. E., 92; *Shaw v. Public Service Corp.*, 168 N. C., 611, 84 S. E., 1010; *Turner v. Power Co.*, 154 N. C., 131, 69 S. E., 767; *Harrington v. Wadesboro*, 153 N. C., 437, 69 S. E., 399; *Arrington v. Pinetops*, 197 N. C., 433, 149 S. E., 549.

Due to the deadly and latently dangerous character of electricity, the degree of care required of persons, corporate or individual, furnishing electric light and power to others for private gain, has been variously stated. "The utmost degree of care," was the language adopted and approved in *Haynes v. Gas Co.*, 114 N. C., 203, 19 S. E., 344. "The danger is great, and the care and watchfulness must be commensurate with it," said *Burwell, J.*, in delivering the opinion. And in *Turner v. Power Co., supra, Hoke, J.*, used this language: "Owing to the very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use, the law imposes a very high degree of care upon companies who manufacture and furnish it."

Following are some of the various expressions found in the decisions: "Highest degree of care" *(Ellis v. Power Co.*, 193 N. C., 357, 137 S. E., 163); "highest degree of care in maintenance and inspection" *(Benton v. Public Service Corp.*, 165 N. C., 354, 81 S. E., 448); "high skill, the most consummate care and caution, and the utmost diligence and foresight . . . consistent with practical operation" *(Turner v. Power Co.*, 167 N. C., 630, 83 S. E., 744); "greatest degree of care and constant vigilance" *(Mitchell v. Electric Co.*, 129 N. C., 166, 39 S. E., 801); "very high degree of care" *(Harrington v. Wadesboro, supra)*; "all reasonable precaution" *(Turner v. Power Co.*, 154 N. C., 131); "utmost care and prudence consistent with practical operation" *(Helms v. Power Co.*, 192 N. C., 784, 136 S. E., 9); "rule of the prudent man" *(Hicks v. Tel. Co.*, 157 N. C., 519, 73 S. E., 139); "highest skill . . . which is attainable, consistent with practical operation" *(Electric Co. v. Lawrence*, 31 Col., 308); "necessary care and prudence to prevent injury" *(Love v. Power Co.*, 86 W. Va., 397). In *Parker v. Electric Ry. Co.*, 169 N. C., 68, 85 S. E., 33, a nonsuit was sustained because "the evidence showed that the defendant had exercised every possible care." *Ragan v. Traction Co.*, 170 N. C., 92, 86 S. E., 1001.

In approving these formulæ as to the degree of care required in such cases, it is not to be supposed that there is a varying standard of duty by which responsibility for negligence is to be determined. *Helms v. Power Co., supra.* The standard is always the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions. *Fitzgerald v. R. R.,* 141 N. C., 530, 54 S. E., 391. The standard is due care, and due care means commensurate care under the circumstances. *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33; 9 R. C. L., 1200.

While the jury would have been fully justified in returning a contrary verdict on the defendant's evidence, we think the plaintiff's evidence is amply sufficient as against a demurrer.

The record is free from reversible error, hence the verdict and judgment will be upheld.

No error.

BERNICE LLOYD, ADMINISTRATRIX OF LOUIS LLOYD, DECEASED, v. COLUMBUS MUTUAL LIFE INSURANCE COMPANY.

(Filed 6 May, 1931.)

Insurance R a—Construction of policy of accident insurance as to risks covered thereby.

Where a policy of insurance provides for the payment of a certain sum to the beneficiary named therein in case the insured dies from accidental bodily injuries resulting from "the wrecking or disablement of any . . . private automobile of the pleasure-car type," the language is unambiguous and parol evidence is not admissible to explain the meaning of the words used, and the policy does not cover death from injuries resulting from a wreck of a truck used principally in hauling milk, the word "type" used in the policy implying classification, and the distinction between automobiles and trucks being recognized by the motor vehicle statute of the State, and where the facts are admitted the question of whether death resulted from a risk covered by the policy becomes a proposition of law.

CIVIL ACTION, before *Grady, J.,* at January Special Term, 1931, of DURHAM.

Plaintiff's intestate, Louis Lloyd, was killed on 23 November, 1929, and at the time of his death he held an insurance policy issued by the defendant on 28 February, 1929. The policy provided an indemnity of $1,000 for death from accidental bodily injuries if such death resulted from "the wrecking or disablement of any private horse-drawn vehicle, or private automobile of the pleasure-car type in which the insured is riding or driving," etc. The evidence tended to show that at the time of his death the deceased was riding in a 1929 Model A, one and a half ton Ford truck. This truck had an enclosed cab with a seat that would accommodate three passengers comfortably. The owner of the truck testified that it was used for hauling passengers and truck. He said: "There was no place at the back for passengers to ride. That was to carry what we wanted to haul. We had a body on the back. Sometimes I took my family to church on it. . . . We had a car other than this truck. . . . On the back is a truck body which was used for hauling milk from the Lawrence Dairy on the milk route. It was used for most anything that come to hand and done more hauling of milk than anything else. I also had a five-passenger Ford touring car. That was the principal pleasure car of the family. . . . There was a wreck." Two other men were riding in the truck with the deceased at the time of the wreck.

The third issue was as follows: "Was plaintiff's intestate killed by the wrecking and disablement of a private automobile of the pleasure-car type in which insured was riding as alleged in the complaint?"

At the close of plaintiff's testimony the trial judge intimated that he would give a peremptory instruction directing the jury to answer the third issue "No." The policy provided a benefit of $50 for death due to accident, and the trial judge further intimated that he would instruct the jury to answer the fourth issue "$50."

From judgment upon the verdict awarding plaintiff the sum of $50 she appealed.

R. O. Everett and John W. Hester for plaintiff.
Fuller, Reade & Fuller for defendant.

BROGDEN, J. Is a Ford one and a half ton truck, used principally for hauling milk, "a private automobile of the pleasure-car type?"

The plaintiff insists that the words "private automobile of the pleasure-car type" is an ambiguous term requiring parol evidence as an aid to arriving at the sense and meaning of the words used. The Court does not concur in this view. *Anderson v. Ins. Co.,* 197 N. C., 72; *Grant v. Ins. Co.,* 197 N. C., 122; *Jolley v. Ins. Co.,* 199 N. C., 269.

There is no material controversy between the parties with reference to the facts. Hence the question whether a Ford truck used principally for hauling milk is a "private automobile of the pleasure-car type," becomes a bald proposition of law.

The motor vehicle statute of North Carolina recognizes the difference between automobiles and trucks. This difference appears from C. S., 2612, which levies license fees for motor vehicles. The license fee for an automobile is based upon horse power, and that on motor trucks is based upon carrying capacity or tonnage.

An automobile truck was defined in *American-La France Fire Engine Co. v. Riordan,* 6 Fed. (2d), 964. The Circuit Court for the Second

Circuit said: "An automobile truck is a vehicle for the conveyance for commercial purposes over ordinary roads, and the average type of that kind of vehicle is especially designed both in its propelling mechanism and in its body construction for that function." Referring to a statute taxing motor trucks, the Supreme Court of Kansas in *Filson v. Johnson,* 222 Pac., 742, said: "They are designed for and put to different uses, and the provision defining a motor truck in effect declares that the purpose or use of the vehicle shall determine the classification. If the owner rebuilds and converts an automobile originally designed and sold to be used as a pleasure car, into a motor truck, which he uses to transport commodities, goods and merchandise, produce, or freight, it is his intention and use that governs."

The word "type" used in the policy implies the idea of classification.

Manifestly, the truck in which plaintiff's intestate was riding at the time of his death was by intention, use and construction a commercial vehicle and so classified by the North Carolina statute. Consequently the coverage clause of the policy issued by the defendant did not, upon the evidence, include the accidental death of plaintiff's intestate, and the ruling of the trial judge is upheld.

No error.

THOMAS D. COOPER, RECEIVER, v. NORTH CAROLINA BANK AND TRUST COMPANY.

(Filed 6 May, 1931.)

Appeal and Error K a—Where all parties necessary to final adjudication have not been joined the cause will be remanded.

Where an appeal presents the question of the priority of deeds, mortgages and deeds of trust, but it appears that all parties having an interest in the subject-matter are not before the court, the cause will be remanded in order that they may be made parties to the action, and the judgment of the court below will be vacated without prejudice.

CIVIL ACTION, before *Frizelle, J.,* at February Term, 1931, of ALAMANCE.

This is a controversy without action. The plaintiff is receiver of the Piedmont Trust Company.

The facts set out are substantially as follows:

(1) Carroll, Long and Ward, commissioners, duly sold the land in controversy to Real Estate Investment Company, a corporation in Alamance County. This deed was dated 12 March, 1921, but not recorded until 17 May, 1922.

(2) The Real Estate Investment Company sold the land to Lewey by deed recorded 27 April, 1921.

(3) Lewey and wife executed a deed of trust to Piedmont Trust Company, trustee, to secure notes aggregating $14,500. This deed of trust was filed for registration 27 April, 1921.

(4) Lewey and wife reconveyed the land to Real Estate Investment Company by deed recorded 27 March, 1922.

(5) Real Estate Investment Company executed a deed of trust upon the land to Alamance Insurance and Real Estate Company, trustee, to secure bonds in the sum of $10,000. This deed of trust was filed for registration on 23 October, 1924.

(6) Alamance Insurance and Real Estate Company, trustee, after due advertisement, sold the land under power contained in the deed of trust and executed a deed as trustee to George C. Sharpe. This trustee's deed was filed for registration on 22 September, 1925.

(7) Sharpe and wife reconveyed the property to Alamance Insurance and Real Estate Company by deed filed for registration 4 November, 1925. Thereafter the plaintiff, receiver of Piedmont Trust Company, acting as substituted trustee in the deed of trust from Lewey to Piedmont Trust Company, recorded 27 April, 1921, duly sold the land at public auction in accordance with the power contained in the deed of trust, and the defendant, North Carolina Bank and Trust Company, purchased the land for the sum of $2,700. It was understood at the sale that the plaintiff, receiver, as trustee, was undertaking to sell the land under the first deed of trust and therefore to convey a fee simple title to the purchaser free and clear of encumbrance. When the plaintiff tendered the deed to the defendant it refused to accept it upon the ground that the deed of trust under which the sale was made was not the first deed of trust, contending that the deed of trust of Real Estate Investment Company to Alamance Insurance and Real Estate Company, trustee, securing notes for $10,000 and recorded 23 October, 1924, was a prior lien upon the property, and hence the deed from the plaintiff, receiver of Piedmont Trust Company, trustee, did not convey a good and indefeasible title to the defendant.

From the foregoing judgment the plaintiff appealed.

J. Dolph Long for plaintiff.
E. S. W. Dameron for defendant.

BROGDEN, J. Is a purchaser of real estate affected with notice upon the registration, indexing and cross-indexing of deeds and deeds of trust executed by the grantor and recorded, indexed and cross-indexed prior to the registration, indexing and cross-indexing of the deed under which the grantor holds title?

An examination of the agreed facts discloses that the Real Estate Investment Company received a deed for property, dated 12 March, 1921, but not recorded until 17 May, 1922. Before recording its deed it sold the land to Lewey by deed duly recorded, and Lewey executed a deed of trust to Piedmont Trust Company to secure notes for $14,500, which deed of trust was duly recorded, and thereafter Lewey reconveyed to the Real Estate Investment Company by deed recorded 27 March, 1922. Subsequently the Real Estate Investment Company duly executed a deed of trust to Alamance Insurance and Real Estate Company, trustee, to secure notes aggregating $10,000. This deed of trust was recorded 23 October, 1924. Therefore, when the Alamance Insurance and Real Estate Company, trustee, prepared to take a deed of trust to secure notes for $10,000 on the property the records would have disclosed that the mortgagor, Real Estate Investment Company, had acquired the property on 17 May, 1922, because that was the date of registration of its deed. The question is, was the Alamance Insurance and Real Estate Company, trustee, affected with notice of the prior deed of trust upon the land to Piedmont Trust Company, trustee, securing notes for $14,500, which was recorded prior to the recording of the deed of its grantor?

Upon the facts presented, the plaintiff contends that when the Real Estate Investment Company recorded its deed on 17 May, 1922, the principle of estoppel applied so as to vitalize the recording of all instruments affecting the title prior to 17 May, 1922. The defendant contends that the Alamance Insurance and Real Estate Company was not required to examine recorded instruments, affecting the title, prior to the time of the recording of the deed of its grantor, to wit, on 17 May, 1922. The contentions so made are discussed in *Door Co. v. Joyner,* 182 N. C., 518; 25 A. L. R., 83, and *Whitehurst v. Garrett,* 196 N. C., 154. See, also, *West v. Jackson,* 198 N. C., 693.

The question presented is important, but a decision thereof upon the present condition of the record would not terminate the litigation or adjudicate the rights of all parties concerned for the reason that all parties having an interest in the subject-matter of the litigation are not before the court. Wherefore, the cause is remanded to the Superior Court of Alamance County to the end that all persons having an interest in the controversy may be made parties; and in order that all parties may be heard upon the merits, the judgment is vacated without prejudice.

Remanded.

JONAH CAGLE v. HENRY (J. H.) WILLIAMSON AND IRA CAGLE.

(Filed 6 May, 1931.)

Judgments K b—Order of trial court setting aside judgment for surprise, excusable neglect, etc., is affirmed in this case.

Where the trial court finds that the attorneys for the plaintiff and defendant agreed upon a compromise judgment, and that while on his way to effect the agreement on the date counsel had agreed among themselves the case would be called, the attorney for the defendant was delayed by a closed highway, and that when he arrived at the courthouse he found that on the previous day judgment against his client had been taken by default in a much larger sum than the compromise agreed upon: *Held*, the action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties in *statu quo*, will be upheld on appeal, C. S., 600, the record disclosing that the answer of the defendant set up a meritorious defense.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1931, of MOORE. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendants. At March Term, 1930, the plaintiff recovered a judgment for $2,500 against the defendants. Motion was duly made by defendants, under C. S., 600, to set aside the judgment rendered at March Term, 1930. The court below found the following facts:

"This cause coming on to be heard on motion before Hon. A. M. Stack, judge presiding, at the February Term of the Superior Court of Moore County, and the court finding the following to be the facts:

1. That Jonah Cagle instituted an action for damages in the Superior Court of Moore County against the defendants, J. H. Williamson and Ira Cagle, who employed H. F. Seawell, Jr., an attorney at law at Carthage, N. C., to represent him in said action.

2. That the defendants employed B. S. Hurley, a practicing attorney at law of Troy, N. C., to represent their interest and to defend them in said action.

3. That the case was regularly calendared for trial at the March Term, 1930, of the Superior Court for Moore County, and that at said term the said case was duly calendared to be tried on Tuesday of the first week of court. On the day said case was calendared for trial, the defendants, with their counsel, B. S. Hurley, were in attendance at said court, and after examining the calendar, both the attorney for the plaintiff and the defendants agreed that the said case would not be reached for trial before the following Friday. In the meantime, negotiations were entered into between the attorneys for the plaintiff and the defendants to compromise said case, and on Thursday before the

case was to be called on Friday morning, one John M. Brittain came to Carthage for the purpose of effecting a compromise of the case and the plaintiff, through his counsel, H. F. Seawell, Jr., agreed to compromise the case in full for the sum of $400, and J. M. Brittain did not tender or offer to pay said amount, which offer of compromise the court finds as a fact was duly communicated to B. S. Hurley, attorney for the defendants, and he communicated the same to the defendants in this action immediately and the defendants instructed their attorney, B. S. Hurley, to accept the compromise made and have judgment rendered for the above amount.

That on Friday the defendants, through their counsel, B. S. Hurley, came to Carthage, N. C., for the purpose of compromising said case, but on account of the road having been closed between Carthage and Biscoe, N. C., the defendants' counsel, B. S Hurley, was somewhat late in reaching the court, and after reaching Carthage, found that the case had been called for trial and judgment taken in the sum of $2,500 on Thursday before.

That he immediately called upon H. F. Seawell, Jr., and the said H. F. Seawell, Jr., agreed with the said B. S. Hurley that he would respect the agreement heretofore made and would cancel the judgment upon the payment of $400 previously agreed to between himself and John M. Brittain provided same was paid in sixty days.

4. That on 1 April the court finds as a fact that the said H. F. Seawell, Jr., notified the said B. S. Hurley, attorney for the defendants, that his client would refuse to confirm the compromise made by him of his case and would insist on the payment of the full amount of $2,500.

5. The court finds as a fact that the defendants were not negligent in the conduct of their defense in said action. That indeed if there was negligence, which is not apparent to the court, it was the negligence of their attorney and not of the defendants.

It is further found as a fact that after the motion had been regularly filed upon due notice to set aside the said judgment that $845 was collected on same and turned over to the plaintiff by execution.

It is therefore considered, adjudged and decreed that the said judgment and the same is in all respects set aside and canceled of record and that the case be restored to the civil issue docket for trial.

It is further ordered that the plaintiff, or whoever has the money, restore unto the defendants the sum of $845 which was collected on said judgment. A. M. STACK, *Judge Presiding.*"

The plaintiff's exception and assignments of error is to the judgment rendered on the finding of facts above set forth by Judge A. M. Stack, at February Term, 1931.

H. F. Seawell, Jr., for plaintiff.
B. S. Hurley for defendants.

CLARKSON, J. C. S., 600, N. C. Code, 1927 (anno.) Michie, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo: Provided,* however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained."

The court below found the facts and under the above statute set the judgment aside and placed the parties in *statu quo.* The record discloses that the answer of defendants set up a meritorious defense. From a careful reading of the finding of facts by the court below, we think the judgment rendered by Judge Stack the law in this jurisdiction. *Sutherland v. McLean,* 199 N. C., 345. The judgment below is

Affirmed.

H. G. NASH ET AL. v. CITY OF MONROE ET AL.

(Filed 6 May, 1931.)

Appeal and Error K d—Judgment on former appeal held final, and action of trial court reinstating cause and making new parties held error.

Where it has been finally adjudicated, in an action involving the question, that a city may not pledge its faith and credit by executing a note for the purchase of hospital equipment, but may purchase such equipment out of available funds in its treasury, and later the city claims to have done so out of available funds: *Held,* an order reinstating the case and making the bank which had formerly accepted the note, which had been canceled, and the seller of the equipment parties, is error, the judgment entered on the former appeal being final and not subject to be revived, the only question remaining being whether the city had the available funds for the purpose, in which the new parties were not interested.

CIVIL ACTION, before *McElroy, J.,* at October Term, 1930, of UNION.

This cause was considered by the Supreme Court and the opinion of the Court reported in 198 N. C. Thereafter, on 24 February, 1930, the board of aldermen of the city of Monroe met in regular session and adopted a resolution declaring that the note for $5,000, dated 10 July, 1929, and due 1 January, 1930, be declared void, and that the treasurer of the city be ordered not to pay said note or any interest thereon. On the same date Dr. A. F. Mahoney offered to sell to the city, hospital equipment referred to in the former case, for the sum of $5,000. Thereupon the board of aldermen adopted a resolution setting out that the city now had in its treasury over $5,000, and that the property offered by Mahoney was worth more than said amount. It was thereupon ordered that the city purchase the said hospital equipment and pay Dr. Mahoney out of its funds then in hand the sum of $5,000. The money was accordingly paid, and the record discloses that thereafter the note of $5,000, marked paid by the First National Bank, the holder thereof, was delivered to the clerk of the city of Monroe, although it does not appear who paid the note. It was further ordered by the city council that the costs in the former action be paid together with attorney's fees.

Thereafter, on 1 October, 1930, the plaintiff made a motion in the cause requesting the court to make the First National Bank and Dr. A. F. Mahoney parties defendant, and that said plaintiff be allowed to file an amended complaint. Thereupon, at the October Term, 1930, the trial judge entered an order "that the action be reinstated on the docket; that the First National Bank of Monroe and Dr. A. F. Mahoney be made parties defendant in the above-entitled action, and that summons be duly issued to each of said defendants, and the plaintiff be allowed to file an amendment to his complaint," etc.

From the foregoing judgment the defendant, city of Monroe, appealed.

J. Laurence Jones and J. L. Delaney for plaintiff.
John C. Sikes and Gilliam Craig for defendant.

BROGDEN, J. The plaintiff insists that the order of the trial judge was an interlocutory order, and that an appeal was premature and should be dismissed. The defendant, upon the other hand, contends that the judgment in the former action was a final judgment, and consequently, the trial judge had no authority to resurrect a dead case and put it back on the trial docket.

The contention of defendant is sound and is directly supported by *Polson v. Strickland,* 193 N. C., 299. See, also, *Moore v. Edwards,* 192 N. C., 446.

The suit was brought originally to restrain the payment of the note and to prevent the city from including the amount of the note in the budget. In the former opinion the Court held that while no tax could be levied for the purpose of discharging the indebtedness, notwithstanding, if the city "had the money in its treasury, it could purchase equipment for its hospital." Thereafter, the city purchased the equipment from Dr. Mahoney and contends that the purchase price thereof was paid out of current funds then in the treasury. The only question then, open to contest is, did the city have the money, legally available, for making the purchase? Neither the bank nor Mahoney has any legal interest in this question, and the order bringing them into court was improvidently made.

Upon consideration of all the facts and circumstances, it is obvious that a moot question only is presented. The policy of the law with respect to such is well settled.

Reversed.

JOHN S. LITTLE v. MARTIN FURNITURE COMPANY.

(Filed 6 May, 1931.)

1. **Waters and Water Courses C c—An action will lie for damages caused by pollution of stream.**

   Where the defendant's septic tank overflows and pollutes a stream the plaintiff may recover damages proximately caused thereby.

2. **Judgments F d—Motion for judgment non obstante veredicto will not be granted where the pleadings support the verdict.**

   A motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, and the defendant's motion was properly overruled upon the authority of *Iron Works v. Beaman,* 199 N. C., 537, and cases cited.

3. **Damages F c—Refusal of request to limit recovery to nominal damages held proper in this case.**

   In this action to recover damages caused by the pollution of a stream by the defendant the action of the trial court in refusing defendant's request to limit the recovery to nominal damages is held in accord with the decision in *Finger v. Spinning Co.,* 190 N. C., 74, and cases cited.

4. **Waters and Water Courses C c—Defendant is liable for damages caused by his pollution of stream regardless of pollution by others.**

   Where the defendant's septic tank has overflowed and polluted a stream, proximately causing damage to the plaintiff's land, the defendant is liable therefor, although the stream may have been polluted from other sources also, and the plaintiff is entitled to have the jury assess such damages as proximately flowed from the defendant's wrong.

APPEAL by defendant from *Shaw, J.,* at September Term, 1930, of CATAWBA.

Civil action for damages, tried upon the following issues:

"1. Was the plaintiff damaged by reason of the alleged outflow from the defendant's septic tank, as alleged in the complaint? Answer: Yes.

2. Is the plaintiff's cause of action barred by the statute of limitation, as alleged by the defendant? Answer: Yes, only as to any cause of action accruing to plaintiff prior to 4 August, 1924. (By consent.)

3. What damage, if any, is the plaintiff entitled to recover? Answer: $500."

Judgment on the verdict, from which the defendant appeals, assigning errors.

No counsel appearing for plaintiff.
E. B. Cline for defendant.

STACY, C. J. The plaintiff's cause of action is supported by the decisions in *Nance v. Phosphate Co., ante,* 702; *Masten v. Texas Co.,* 194 N. C., 540, 140 S. E., 89; *Rhyne v. Mfg. Co.,* 182 N. C., 489, 109 S. E., 376.

The defendant's motion for judgment *non obstante veredicto,* which, in effect, is but a belated motion for judgment on the pleadings, was properly overruled on authority of *Iron Works v. Beaman,* 199 N. C., 537; *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Shives v. Cotton Mills,* 151 N. C., 290, 66 S. E., 141.

The action of the court in refusing defendant's request to limit plaintiff's recovery to nominal damages accords with what was said in *Finger v. Spinning Co.,* 190 N. C., 74, 128 S. E., 467; *Cook v. Mebane,* 191 N. C., 1, 131 S. E., 407; *Rhyne v. Mfg. Co., supra.*

The fact that the stream in question may have been polluted from other sources, as well as from the defendant's septic tank, neither defeats the plaintiff's cause of action nor denies him the right to have the jury assess such damages as proximately flowed from the defendant's wrong. *Moses v. Morganton,* 192 N. C., 102, 133 S. E., 421; 26 R. C. L., 764; Note, 9 A. L. R., 947. "To show that other causes concurred in producing or contributing to the result complained of is no defense to an action for negligence." *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299. The defendant's negligence, in order to render him liable, must be the proximate cause, or one of the proximate causes, but it need not be the sole proximate cause, of the plaintiff's injury. *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564.

The record discloses no exceptive assignment of error which can be sustained, and, as the case involves only settled principles of law so far as the present record is concerned, the verdict and judgment will be upheld, without further elaboration of the exceptions.

No error.

TILLIE MAY HAGLER, WIDOW OF WILLIAM HAGLER, DECEASED, AND HER CHILDREN, DEPENDENTS, v. MECKLENBURG HIGHWAY COMMISSION, EMPLOYER.

(Filed 6 May, 1931.)

1. **Appeal and Error A e—Whether award to dependents of county employee was in violation of Art. VII, sec. 7, held academic on this appeal.**

   Where on appeal from an award of the Industrial Commission to the dependents of an employee of a county highway commission there is nothing in the record showing that the board of commissioners of the county has attempted to levy a tax, contract a debt, pledge its faith, or loan its credit in breach of Article VII, section 7, of the Constitution, an objection to the award on the ground that the Workmen's Compensation Act is in conflict with the provisions of Article VII, section 7, presents an academic question, and one which should be considered only upon a full disclosure of all facts in a proceeding to which the board is made a party and given an opportunity to be heard.

2. **Master and Servant F d: Jury C c—Trial by jury is not constitutional right under Workmen's Compensation Act.**

   The State has waived its sovereignty as to the claim of an injured employee under the Workmen's Compensation Act, and under the act trial by jury is not a constitutional right, and an objection to an award of the Industrial Commission to the dependents of a county employee on the ground that the act deprives the defendant of its right to trial by jury is without merit. Const., Art. I, sec. 19.

APPEAL by defendant from *Cowper, Special Judge,* at March Term, 1931, of MECKLENBURG. Affirmed.

The Mecklenburg Highway Commission is a corporation created by the General Assembly at the session of 1921. Public-Local Laws 1921, ch. 383. It has full charge of the building, maintenance, repair, and improvement of such of the public roads of the county as are not a part of the State system. At the time of his injury and death William Hagler was one of its employees and was engaged in the performance of assigned duties. These are admitted facts. The dependents of the deceased filed their claim for compensation with the Industrial Commission, who adjudged that the defendant pay the widow of the deceased compensation at a weekly rate of $10.80 for a period of 350 weeks, and, to the person entitled, funeral expenses not to exceed $200. From the award the defendant appealed to this Court.

J. L. Delaney for appellant.
Pharr, Bell & Pharr for appellees.

ADAMS, J. The appellant contends that the award of the Industrial Commission should be set aside for two reasons: (1) The Workmen's Compensation Act (P. L. 1929, ch. 120) is in conflict with the Constitution, Article VII, sec. 7, which provides that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein"; (2) the act deprives the defendant of its right to a trial by jury, in contravention of Article I, section 19, which provides that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

The first objection raises an academic question. There is nothing in the record showing that the board of commissioners of Mecklenburg County has attempted to levy a tax or to contract a debt, or to pledge its faith, or to loan its credit in breach of Article VII, section 7, of the Constitution. A question of this importance should be considered and determined upon a full disclosure of all facts in a proceeding to which the board is made a party and given an opportunity to be heard.

The second ground of objection is without merit. The State has waived its sovereignty as to the claim of an injured employee, and neither the State nor any of its political subdivisions has the right to reject the provision of sections 5, 6, 15, 16, 17 of the Compensation Law, or any of its provisions relative to payment and acceptance of compensation. Section 8. *Baker v. State, ante,* 236; *Moore v. State, ante,* 300. Under this act trial by jury is not a constitutional right. *McInnish v. Board of Education,* 187 N. C., 494; *Groves v. Ware,* 182 N. C., 553; *Commissioners v. George, ibid.,* 415; *Mountain Timber Co. v. Washington,* 243 U. S., 219, 61 Law Ed., 685. Judgment

Affirmed.

R. E. HALL v. DURHAM LOAN AND TRUST COMPANY, SALLIE H. UMSTEAD, ANNIE H. SWINDELL, KATHLEEN H. WATKINS AND DURHAM LOAN AND TRUST COMPANY, SALLIE H. UMSTEAD, ANNIE H. SWINDELL AND KATHLEEN H. WATKINS, ADMINISTRATORS OF THE ESTATE OF J. D. HAMLIN, DECEASED.

(Filed 6 May, 1931.)

1. **Executors and Administrators C b—Contract of employment in this case held not terminated by death of employer.**

An entire and indivisible contract providing for the employment of the plaintiff as a clerk in a warehouse for a stated period of time at an agreed price is not terminated by the death of the employer, and the employer's estate is liable to the employee for salary accruing thereunder after the employer's death.

2. **Executors and Administrators C h—Evidence held insufficient to hold personal representatives liable on contract of employment.**

An employee under a contract of employment with the deceased brought action against the estate of the deceased and his personal representatives individually to recover that part of his salary accruing after the death of the deceased: *Held*, evidence of a contract of employment between the personal representatives in their individual capacity and the employee is insufficient to be submitted to the jury, it appearing from the evidence that the personal representatives dealt with the employee in their representative capacity only and that the employee considered that his agreement for the continuance of the work after the death of the employer was made with them as administrators.

APPEAL by plaintiff from *Grady, J.*, at February Special Term, 1931, of DURHAM. Affirmed.

The plaintiff, R. E. Hall, alleges that one J. D. Hamlin employed him for the tobacco season of 1929-1930, at the stipulated price of $1,500 for the season's work, and that said season consisted of five months and the plaintiff was due for his services the sum of $300 per month; that prior to the death of J. D. Hamlin, deceased, he had paid or caused to be paid to the plaintiff on the season's work the sum of $850, and there was due the plaintiff at the time of the death of said Hamlin the sum of $650 for the remainder of the season. That immediately after the death of the said Hamlin the defendants undertook in their individual capacity to continue the operation of the said warehouse theretofore conducted by their intestate, and in so doing employed the plaintiff to continue in the capacity of clerk, which he had theretofore filled at the salary agreed upon between himself and the said Hamlin; that defendants secured license from the proper authorities to conduct the warehouse business, and did so until the close of the season, or for a period of about two months; there is due the plaintiff by defendants individually for services rendered them by plaintiff the sum of $600, and $50 from the estate of said Hamlin.

The defendants denied that they were individually liable to plaintiff for the services rendered by him, but admitted that the estate of the said Hamlin was liable.

After the reading of the pleadings, the plaintiff tendered the following issues:

"1. In what sum, if any, is the estate of J. D. Hamlin indebted to the plaintiff for work and labor performed for J. D. Hamlin prior to his death?

2. In what sum, if any, are the defendants indebted to the plaintiff for work and labor performed in the operation of the Planters Warehouse subsequent to 30 December, 1929?"

And thereupon the following admissions were made in open court:

"1. It was admitted that J. D. Hamlin died 30 December, 1929.

2. That the defendants in their representative capacity never secured any order of court to permit them to continue the business of their intestate.

3. The defendants admitted in open court the liability of the estate of J. D. Hamlin, deceased, to the extent of the sum of $650."

The court below rendered the following judgment: "This cause coming on to be heard, and the defendants having admitted during the trial that the plaintiff is entitled to recover of them as administrator and administratrices of the estate of J. D. Hamlin, deceased, the sum of $650, and interest thereon at six per cent per annum from 28 February, 1930, and the plaintiff contending, upon the evidence offered, that he is entitled to a personal judgment against the defendants upon the contract alleged, in the complaint, and the court being of the opinion, upon the evidence offered, that the plaintiff cannot recover as against the defendants individually, but can only recover against them as personal representatives of J. D. Hamlin, deceased: It is, therefore, ordered, adjudged and decreed that the plaintiff have and recover of the defendants, Durham Loan and Trust Company, Sallie H. Umstead, Annie H. Swindell and Kathleen H. Watkins, administrator and administratrices of J. D. Hamlin, deceased, the sum of $650 and interest thereon at six per cent per annum as from 28 February, 1930, together with the costs of this action to be taxed by the clerk. And it is further ordered and adjudged that the plaintiff is not entitled to recover of the defendants individually.

This 13 February, 1931.

HENRY A. GRADY, *Judge Presiding.*"

The exceptions and assignments of error made by plaintiff were as follows:

"1. The plaintiff objected and excepted to his Honor's intimation that he would hold as a matter of law the defendants were not individually liable to the plaintiff for the sum of $600.

2. The plaintiff objected and excepted to his Honor's ruling declining to submit the question of individual liability of the defendants to the jury as one of a mixed question of law and fact.

3. Plaintiff excepted to his Honor's signing the judgment, holding that the defendants were not individually liable."

The assignments of error and material facts will be set forth in the opinion.

R. O. Everett for plaintiff.

Watkins & Hofler for defendants Sallie H. Umstead, Annie H. Swindell, Kathleen H. Watkins, individually and as administratrices of the estate of J. D. Hamlin, deceased.

Fuller, Reade & Fuller for Defendant Durham Loan and Trust Company, administrator and individually.

CLARKSON, J. The defendants will be termed in the opinion "administrators."

Questions presented by plaintiff:

(1) Is the estate of an employer of a clerk in a warehouse, employed for a definite period of time, liable to said clerk for his salary for the unexpired time, accruing after the death of the employer? We think so; death did not terminate this type of contract. As to contracts made by a corporation, which became insolvent and was placed in the hands of a receiver, see *Lamson Co. v. Morehead,* 199 N. C., at p. 168, and cases cited.

Plaintiff's exceptions and assignments of error are to the effect that on all the evidence the court below held that plaintiff could not recover from the defendants individually. In this we can see no error. The court below allowed a recovery against defendants in their representative capacity for the amount of $650.

The plaintiff alleges, and the evidence is all to the effect, that plaintiff had an entire or indivisible contract with defendants' intestate, J. D. Hamlin, as an employee in the capacity of clerk for the tobacco season of 1929 and 1930, at an agreed price of $1,500. That J. D. Hamlin died 30 December, 1929, and plaintiff had been paid $850, and there was unpaid $650 on the contract. The death of Hamlin, under the facts and circumstances of this case, we do not think relieved his estate of this unpaid obligation. If plaintiff was ready, able and willing to perform his part of the contract, tendered his services to the defendants, administrators of the estate of J. D. Hamlin, and they refused to continue him in the employment, plaintiff's remedy was to sue for the breach or use due care to minimize the loss and at the expiration of the time for fulfilling the contract to sue for the balance, less what plaintiff made in the *interim. Smith v. Lumber Co.,* 142 N. C., 26.

"The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence require to minimize the loss." *Hoke, J.,* in *Yowmans v. Hendersonville,* 175 N. C., p. 579; *Mills v. McRae,* 187 N. C., at p. 709; *Monger v. Lutterloh,* 195 N. C., at p. 280; *Gibbs v. Telegraph Co.,* 196 N. C., at p. 522.

If the defendant administrators refused to carry out the contract between plaintiff and their intestate, J. D. Hamlin, the estate would be liable to plaintiff in accordance with the law above set forth.

In *Pugh v. Baker,* 127 N. C., at p. 7-8, is the following: "The plaintiff was employed by Carter, not at the will of Carter, but by the year, payments to be made monthly for his work, and the appointment of an administrator, and his ratification of the contract of his decedent, during the year 1898, could not have affected, one way or the other, the original contract between the plaintiff and Carter. The plaintiff did exactly what he contracted to do with Carter, and the contract was binding on Carter during his life, and on his personal representative after his death. But we find elsewhere numerous authorities for this position. 'Under a contract for employment for a specified time, the employee may recover from the personal representative as such for the whole term, though part of the services were rendered after the employer's death.' 8 Am. and Eng. Enc. Law (2 ed.), p. 1008, and cases there cited."

In 24 C. J. (Executors and Administrators), part section 472, p. 53-4, the following is laid down: "Executors or administrators are in general bound by all the covenant or contract obligations of their decedents, except such as are personal in their nature and of which personal performance by the decedent is of the essence; or such as are terminated by decedent's death, even though performance is detrimental to the estate; and where the personal representative neglects or refuses to carry out the contract of the decedent, the other party has the usual remedies, as in electing to treat it as rescinded and claiming damages. Conversely, the executor or administrator has the right to carry out the contracts of his decedent, even though they are of a personal nature, and enforce the fulfillment of obligations to his decedent where likely to prove beneficial to the estate. (Note i.) An administrator may perform a contract of his intestate for the estate's benefit without an order therefor from the county court, where the contract is not of a strictly personal nature, assuming the risk of being required to make good any loss that may ensue, and if he acts in good faith without such order to comply with intestate's contract his acts as to the other party to the contract are binding upon the estate. *Kadish v. Lyon,* 229 Ill., 35, 82 N. E., 194."

"Where the personal representative performs the contract or covenant of his decedent and completes the transaction, the estate will be held bound for any loss sustained thereby, and will be entitled to any profit realized in consequence." 24 C. J., *supra,* part sec. 472, at p. 55.

In *Siler v. Gray,* 86 N. C., at p. 570, we find the following: "It is true that the cases put down in the books, like those cited by us, are generally those in which the contracts sued on have been to marry—to teach an apprentice—to render services as an author, or as a doctor or a lawyer—such as will be determined by the very nature of the services to be rendered or the skill requisite to perform them, to the exclusion of all thought of performance by any other person than the contracting party."

In *Burch v. Bush,* 181 N. C., at p. 127: "Those of a strictly personal nature, involving particular personal skill or taste, such as a contract of an author to write a book, an artist to paint a picture, a sculptor to carve a piece of statuary, a singer to give a concert, and a promise to marry, are personal contracts and die with the person. Death makes the performance of such contracts impossible; and, indeed, removes the main object and inducement for the agreement. Executors and administrators are unable to perform such contracts, and the estate of the deceased cannot be held liable in damages by reason of the failure to complete them. Ordinarily, contracts falling under this exception come under the general rule, and death does not excuse performance. 13 C. J., 643, *et seq.*" At p. 128: "Of course, where the personal representatives of a deceased are able to do so, and, in good faith, offer to complete the contract, and the other party refuses to accept such offer and declines to permit the personal representatives to proceed, such would relieve them from further performance. They would be entitled, then, to an accounting, and to recover as upon a *quantum meruit. Whitlock v. Lumber Co.,* 145 N. C., 120; *Navigation Co. v. Wilcox,* 52 N. C., 481, and *Buffkin v. Baird,* 73 N. C., 283. Again, the surviving party may abandon the contract and thus forfeit his right to call upon the personal representatives of the other party to continue with the agreement." *Harris v. Wright,* 118 N. C., 422; *Harwood v. Shoe,* 141 N. C., 161.

In *Snipes v. Monds,* 190 N. C., at p. 191, citing numerous authorities, it is said: "An executor cannot, by any contract of his, fasten upon the estate of his testator *liability created by him, and arising wholly out of matters occurring after the death of the testator.*" (Italics ours.)

In *Allen v. Armfield,* 190 N. C., at p. 870-1, we find: "A personal representative is not answerable in his official character for a cause of action not created by the decedent. As the Court said in *Whisnant v. Price,* 175 N. C., 611, the uniform rule is that no action will lie against the personal representative of a deceased person except upon some claim which existed against the deceased in his lifetime and for a claim accruing wholly in the time of the administration, the administrator is liable only in his personal character. *Snipes v. Monds, ante,* 190."

The other question presented by plaintiff:

(2) Was there sufficient evidence to go to the jury on the question of a contract of employment between the defendants individually and the plaintiff for that portion of the tobacco season of 1929-30 expiring subsequent to the death of plaintiff's former employer? We think not.

In the present case the defendant's administrators carried out the contract made by plaintiff with their intestate, and plaintiff, under the facts and circumstances of this case, can recover from them only in their representative capacity.

Plaintiff testified in part: "I do not remember Mrs. Swindell (one of the administratrices) mentioning anything about not making any new contracts, but wanting to give us an opportunity to complete our contracts with her father, that we might leave if we desired to do so, and that if we continued we would have to file our claim against the estate and that she didn't know how long it would be before we received our money. . . . No price was mentioned between Mrs. Swindell and myself. I did not have any understanding with Mrs. Swindell as to what amount would be paid me at all. I expected to get the amount Mr. Hamlin had contracted to pay me because she didn't mention what she was going to pay us, so I just expected the balance of my salary. I expected some arrangements would be made to pay me before or directly after the season closed. *I expected the administrators to pay me. I didn't expect I had a contract with the individuals. I expected the administrators to pay me. I considered I made a contract with the individuals as administrators.* . . . I have brought suit for a certain amount against the estate."

There were certain expressions, according to plaintiff's testimony, made by Mrs. Swindell tending to show individual responsibility, but at the same time reasonably construed with plaintiff's testimony above set forth, it indicates they were made as an administratrix carrying out a contract that in law the administrators were bound to carry out or suffer loss. In fact, from the above testimony, plaintiff looked to the estate for payment.

The other evidence on the part of plaintiff was not sufficient to be submitted to a jury to show individual responsibility on the part of defendants. The judgment below is

Affirmed.

J. GLENN SMITH, EXECUTOR OF ROBERT G. SMITH, DECEASED, ET AL., v. THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA.

(Filed 6 May, 1931.)

Removal of Causes D a—Allegation and proof determines amount in controversy and not the prayer for judgment.

The sum which the plaintiff in an action is entitled to recover is the amount to which he is entitled upon the allegation and proof, and not the amount prayed for in the prayer for relief, and where an action is brought on a five thousand-dollar policy of insurance, the complaint alleging upon information and belief that the amount recoverable was not less than three thousand dollars and praying judgment in the sum of three thousand dollars, and the plaintiff expressly refuses to waive or remit the amount of their claim in excess of three thousand dollars, the amount in controversy is within the jurisdiction of the Federal court, and the defendant's motion for removal of the cause from the State to the Federal court on the ground of diversity of citizenship should be allowed.

APPEAL by plaintiff from *Cowper, Special Judge,* at March Special Term, 1931, of MECKLENBURG. Affirmed.

This action to recover on a certificate of membership issued by defendant to Robert G. Smith, deceased, was begun in the Superior Court of Mecklenburg County, North Carolina, on 6 December, 1930.

Plaintiffs allege in their complaint that by the terms of said certificate of membership they are entitled to the benefits thereof; that Robert G. Smith died on 15 September, 1929, from bodily injuries received by him through external, violent and accidental means on 5 September, 1929; that said bodily injuries, independently of all other causes, resulted in his death; and that at the date of his death the said Robert G. Smith was a Class A member of the defendant association in good standing.

Paragraph 5 of the original complaint filed by the plaintiffs is as follows:

"That a portion of Article 10 of section 4 of the defendant's constitution provides as follows:

"Whenever a Class A member in good standing shall through external, violent and accidental means, under the limitations and provisions of the constitution and amendments thereto, receive bodily injuries which shall independently of all other causes, result in death within six months from the date of said accident, $5,000 shall be paid to the beneficiary named in said certificate of such deceased Class A member."

Before the time within which the defendant was required to file an answer or other pleading to the complaint, had expired, plaintiffs amended their original complaint by striking therefrom paragraph 5 as above set out, and substituting instead thereof the following:

"5. The plaintiffs are informed and believe, and upon such information and belief allege, that the constitution and by-laws of the defendant provide in substance, that whenever a Class A member in good standing shall, through external, violent and accidental means, receive bodily injury which shall, independently of all other causes, result in death, then the beneficiary named in the certificate of such Class A deceased member shall be paid a certain amount of money, which amount, as the plaintiffs are informed and believe, is not less than $3,000."

The prayer for judgment in the original complaint, which has not been amended in that respect, is as follows:

"Wherefore, the plaintiffs pray judgment against the defendant in the sum of $3,000, with interest thereon from 5 September, 1929, and for the costs of this action to be taxed by the clerk."

Thereafter, and before the time within which defendant was required to file an answer or other pleading to the complaint had expired, the defendant filed its petition, accompanied by the bond required by law, for the removal of the action from the Superior Court of Mecklenburg County to the District Court of the United States for the Western District of North Carolina for trial. The ground for such removal, as set out in the petition, is diversity of citizenship, it also being alleged in the petition that the amount in controversy in the action exceeds the sum of $3,000, exclusive of interest and cost.

It was thereupon ordered by the clerk of the Superior Court that the action be removed in accordance with the prayer of defendant's petition. Plaintiffs excepted and appealed to the judge.

At the hearing of this appeal the plaintiffs having expressly declined to file a formal remittitur for all amounts in controversy over and above $3,000, exclusive of interest and cost, as suggested by the judge, the order of removal made by the clerk was confirmed. Plaintiffs excepted and appealed from the order of the judge to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiffs.
Tillett, Tillett & Kennedy and F. Grainger Pierce for defendant.

CONNOR, J. The sole question involved in this appeal is whether the amount in controversy in the action pending in the Superior Court of Mecklenburg County, as shown by the entire record, exceeds the sum of $3,000. If the amount does not exceed this sum, there was error in the order of the judge confirming the order of the clerk for the removal of the action from the State court to the Federal court, and said order should be reversed. In that event the District Court of the United States has no jurisdiction of the action. If, however, the amount in controversy exceeds the sum of $3,000, exclusive of interests and costs, there was no error in the order, and the same should be affirmed. In that event the District Court of the United States has jurisdiction of the action, and the defendant, under the Constitution and laws of the United States, is entitled to the removal of the action.

On the cause of action alleged in the original complaint, the plaintiffs are entitled to recover of the defendant the sum of $5,000. This cause of action arises on contract and is not divisible for purposes of jurisdiction. On the allegations of the amended complaint, plaintiffs are entitled to recover judgment for all the benefits to which they are entitled as beneficiaries under the certificate of membership in the defendant association held by Robert G. Smith at the date of his death. It is expressly provided in the constitution and by-laws of the defendant that in the event which has occurred, as appears from the allegations of the complaint, the sum of $5,000 shall be paid by the defendant to the beneficiaries designated in the certificate. It is clear, we think, that the amount in controversy in the action is $5,000, notwithstanding the amendment to the complaint, unless, as contended by the plaintiffs, this amount is to be determined not by the allegations of the complaint, but by the prayer therein that the plaintiffs recover of defendant on their cause of action only the sum of $3,000, with interest and cost.

It is provided by statute in this State that the complaint in a civil action must contain a demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated. C. S., 506. It has been held that under this statute, the plaintiff is not restricted to the specific relief demanded in the prayer of his complaint, but that he may have all the relief to which he is entitled on the facts alleged in his complaint and established by the evidence at the trial. This principle has been applied frequently in cases where the relief granted was equitable in its nature. *Bryan v. Canady,* 169 N. C., 579, 86 S. E., 584; *Hendon v. R. R.,* 127 N. C., 110, 37 S. E., 155; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265; *Knight v. Houghtalling,* 85 N. C., 17. In the last cited case it is said: "We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of the contract. But we understand that, under the Code system, the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the Code has adopted the old equity practice when granting relief under a general prayer, except that now no general prayer need be expressed in the pleadings, but is always implied." In *Reade v. Street,* 122 N. C., 301, 30 S. E., 124, which was an action on a note, it was said that the prayer of the complaint does not bind the plaintiff who is entitled to such judgment as the pleadings and proof justify. Hence, it was held that if a judgment is for a greater amount, or of a different nature from the prayer for judgment, but is justified by the pleadings and proof, it is immaterial that it is not in conformity with the prayer of the complaint. In that case the judgment was for $457.72, whereas the prayer was for the recovery of only $423. In his opinion, *Judge Clark* says: "The prayer for judgment does not bind the plaintiff, as he may have mistaken the relief to which he is entitled upon his pleadings and proof. Indeed where the proof is of a greater sum than that alleged in the complaint, the court below might permit an amendment of the complaint even after judgment." See *Henofer v. Realty Co.,* 178 N. C., 584, 101 S. E., 265, where *Reed v. Street* is cited and approved.

It is also provided by statute in this State that the relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in every other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. C. S., 606. As the time for answering the complaint in the instant action had not expired, when defendant filed its petition for the removal of the action, and as the right of defendant thereafter to file an answer, either in the State court, in the event its petition was denied, or in the Federal court, in the event its petition was granted, was not affected by the order, whether of removal or not, this statute is not applicable to the decision of the question involved in this appeal. The restriction of the relief which may be granted a plaintiff, when no answer is filed by the defendant, applies only when the plaintiff moves for judgment by default final, C. S., 595, or for judgment by default and inquiry. C. S., 596.

In the absence of a waiver by the plaintiffs in the instant case, in the nature of a remittitur, express or implied, of their right to recover the full amount to which they are entitled on the cause of action alleged in the complaint, this amount, and not the amount for which they demand judgment, is the amount in controversy for the purpose of determining whether or not defendant is entitled to the removal of the action from the State to the Federal court for trial. There is no express waiver on the record; nor are there any facts from which a waiver may be implied. Plaintiffs at the hearing before the judge on their appeal from the order of the clerk, expressly declined to enter on the record such waiver.

We have examined the cases cited and relied on by plaintiffs in this Court to sustain their contention that the amount in controversy in this action is only $3,000. We do not regard these cases as controlling or as determinative of the question involved in this appeal.

In *Iowa C. R. Co. v. Bacon,* 236 U. S., 305, 59 L. Ed., 591, where the petition for removal was denied on the ground that the amount in controversy was less than the amount required for the jurisdiction of the Federal court, it is said: "It was, of course, essential to the removal of the case, that the amount in controversy should have been sufficient to give the Federal court jurisdiction. The State court had authority to determine the effect of the prayer to the petition, and it decided that under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the estate had suffered damage in the sum of $10,000."

This was an action brought in a State court of Iowa to recover damages for wrongful death. The damages were alleged in the complaint at $10,000; the sum demanded in the prayer was less than the amount required to confer jurisdiction on the Federal court. In this case, reported in 137 N. W., at page 1011, it was said by the Supreme Court of Iowa that in that State in an action for unliquidated damages, a prayer in the petition for a judgment in a sum less than the damages alleged therein is equivalent to a remittance or waiver of the difference, and establishes the amount in controversy. For this reason, the petition of the defendant for the removal of the action to the Federal court from the State court, was properly denied by the latter court.

In *Woods v. Massachusetts Protective Association,* 34 Fed. (2), 501, it was held that where plaintiff, as beneficiary under a life insurance policy for the sum of $5,000, brought suit in a State court, and demanded judgment for the sum of $3,000 only, the action was not removable from the State court to the Federal court, because the amount in controversy, as determined by the prayer for judgment did not exceed the sum of $3,000, exclusive of interest and cost. The action was heard in the United States District Court on a motion to remand to the State court from which it had been removed. The motion was allowed. In his opinion the judge quoted with approval from 17 Standard Proc., 878, as follows:

"If an amount above the jurisdiction of the court remains due and unpaid on an obligation or debt, a party may voluntarily remit and abandon all claim and right to recover the amount which thus exceeds the jurisdiction and may maintain his action for an amount within the jurisdiction of the court."

In *Beatty, Admx., v. Massachusetts Protective Association,* decided by the Supreme Court of South Carolina on 5 March, 1931, and not yet reported, involving the validity of an order of the State court denying the petition of the defendant for the removal of the action from the State court to the Federal court, it was held that the amount in controversy was determined by the prayer for judgment in the sum of $3,000, and not by the allegations of the complaint which were sufficient to constitute a cause of action on a life insurance policy for $5,000. In that case it is said: "It is true, this Court has repeatedly held that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the form of the prayer for relief; that is, he will be given such relief as he may be entitled to notwithstanding that the prayer for relief is defective. Especially is this true in an equity case. But this does not mean that a party instituting a suit cannot remit or waive so much of his claim as he sees fit, and such remittance or waiver amounts to an acknowledgment of payment for the amount so waived or remitted, for which an action could not afterwards be maintained. Such waiver or remittance may be set forth either in the body of the complaint or in the prayer for relief, either directly or indirectly. When the plaintiff in the prayer for relief asks for a smaller amount than that stipulated in the instrument sued on it amounts to a waiver and the plaintiff, as in the case at bar, cannot afterwards maintain an action for the amount so waived, but is bound thereby." We regard this as a correct statement of the law, but where as in the instant case, the plaintiffs expressly declined to waive or remit the amount of their claim, as shown by the entire record, and thereby reserved the right thereafter to move the State court, in its discretion, for leave to amend the prayer of their complaint, this principle is not applicable.

We find no error in the order. It is

Affirmed.

MOLLIE J. MARSH ET AL. v. H. C. MARSH ET AL.

(Filed 6 May, 1931.)

1. **Deeds and Conveyances C f—Meaning of conditions for support of a person is usually determined by construction of entire instrument.**

   Clauses in a conveyance of real property providing for the support and maintenance of a person are usually determined as to their effect by a construction of the entire instrument, one clause may be construed as a personal covenant, another a charge on rents and profits of the land, or another a lien or charge on the land itself.

2. **Same—Condition for support of person in this case held to be charge on land itself and prior to subsequent mortgage.**

   A husband and wife conveyed their lands to their son to effect a family agreement, the deed providing for the support of the grantors and the payment of a certain sum of money to the grantee's sister as part of the consideration, all parties in interest signed the deed, and it was duly registered, the son failed to comply with the conditions therein imposed on him, and by a subsequently registered mortgage obtained a loan for his separate and personal use: *Held*, the provisions for the support of the parents and sister amounting to an equitable lien on the lands prior to that of the mortgage, the mortgagee taking with notice thereof by reason of the prior registration of the deed.

APPEAL by defendants Chickamauga Trust Company, trustee, and Prudential Insurance Company of America, from *Stack, J.*, at February Term, 1931, of UNION. No error.

Action to declare certain provisions in a deed of conveyance an equitable lien or charge on land. On 29 March, 1920, J. D. Marsh and his wife executed and delivered to H. C. Marsh a deed conveying three tracts of land containing 326 acres. The deed was signed by the grantors and by the grantee and Lois Lee Marsh. The parties stipulated that H. C. Marsh should pay to his sister, Lois Lee Marsh, $3,000 from time to time as she should need the money (for which he executed a note) and should take care of J. D. Marsh and his wife so long as they should live, and "provide for them a home, suitable clothing, board, and take care of them in a reasonably comfortable manner, and pay all doctor and medical bills and supply them with reasonable necessaries of life." It was agreed that if he failed to do so at any time the property should revert to the grantors during their natural lives and that they should receive the rents and profits as long as they or the survivor should live, and that the property at the death of the survivor, should go to the grantee in fee. H. C. Marsh was to pay their funeral expenses and erect a marker at their graves.

H. C. Marsh and Lois Lee Marsh are the son and daughter of the grantors in the deed. J. D. Marsh died in 1921.

On 12 September, 1925, H. C. Marsh made a deed of trust to the Chickamauga Trust Company, as trustee, purporting to convey the land in controversy to secure a debt due by him to the Prudential Insurance Company of America, and the trustee has advertised the land for sale.

The deed executed to H. C. Marsh by his father and mother recites as the consideration a nominal sum and the covenants, agreements, terms, conditions and qualifications therein set forth.

The jury returned the following verdict:

1. Is the plaintiff, Lois Lee Marsh, a daughter of J. D. Marsh and confined to the State Hospital at Morganton as mentally deficient, as alleged in the complaint? If so, how long? Answer: Yes, about seven years.

2. If so, has W. T. Morgan been duly appointed next friend to the said Lois Lee Marsh and authorized to bring this suit, as alleged in the complaint? Answer: Yes (by consent).

3. Did J. D. Marsh and wife, Mollie J. Marsh, Lois Lee Marsh and H. C. Marsh make and execute the paper-writing referred to in the complaint and registered in Book 56, page 576, in the office of register of deeds for Union County? Answer: Yes (by consent).

4. Has the defendant, H. C. Marsh, paid to the plaintiff, Lois Lee Marsh, the $3,000 described in the paper-writing registered in Book 56, page 576, or any part thereof? Answer: No.

5. Has the defendant, H. C. Marsh, taken care of J. D. Marsh and Mollie J. Marsh and provided for them a home, suitable clothing, board, and cared for them in a reasonably comfortable manner, paid all doctor bills, medical bills and supplied them with the necessaries of life, in accordance with the paper-writing registered in Book 56, page 576? Answer: Not supported Mrs. M. J. Marsh for last two or three years.

6. Has the defendant, H. C. Marsh, paid the funeral expenses and erected a suitable marker to the grave of J. D. Marsh, deceased? Answer: Paid the funeral expenses, but erected no marker to his grave.

7. Did Lois Lee Marsh sign said instrument (Ex. A) as evidence of her consent thereto? Answer: Yes.

It was thereupon adjudged that Lois Lee Marsh is entitled to recover of H. C. Marsh $3,000 with interest at 6 per cent from 1 January, 1921 (the maturity of the note), to be charged upon the land as an equitable lien thereon from 29 March, 1920 (the date of the deed), subject to the life estate of Mrs. Marsh, and therefore prior to the conveyances under which the defendants claim; that the land reverted to Mrs. Marsh for life; and that if H. C. Marsh failed to comply with the contract within sixty days, the land should be sold. The Chickamauga Trust Company and the Prudential Insurance Company of America appealed.

John C. Sikes for plaintiff.

W. B. Love and W. H. Booker for Chickamauga Trust Company and Prudential Insurance Company of America.

ADAMS, J. The meaning of clauses in a conveyance of real property providing for the support or maintenance of a person is usually determined by a construction of the entire instrument. One clause may be a personal covenant, another a charge on the rents and profits of the land, and a third a lien or charge on the land itself. *Bailey v. Bailey,* 172 N. C., 671. It appears in the case before us that H. C. Marsh not only accepted the deed, but signed it under his seal; that he is bound by the provisions of the deed is therefore not in dispute. *In re Peaden,* 199 N. C., 486; *Peel v. Peel,* 196 N. C., 782. The question is whether there are clauses in the deed which create a lien or charge upon the land. We are of opinion that there are and that there is no error in the record.

Many of our decisions have dealt with exceptions similar to the one interposed in this case, and to some of them we refer as authorities in support of the judgment. In *Aston v. Galloway,* 38 N. C., 126, the devise in part was as follows: "I give and devise the land, after the death of my said wife, to my nephew J. A. and his heirs, he paying to my two other nephews E. and G. A. as they respectively arrive at the age of twenty-one years, the sum of £100 each." In the opinion the Court said: "Was the £100 given to the plaintiff as is stated in the case, a charge on the land? We think it was an equitable charge, that is, that in this Court the land is to be regarded as a security for it. In the case of *Abrams v. Windup,* 3 Russ., 35, a testator devised lands to Joseph Bulmer, for paying his son Thomas Bulmer £50, when of the age of twenty-one years. The Master of the Rolls was of opinion that this was a devise of the fee to Joseph Bulmer, charged with the payment of the £50 to his son. In *Miles v. Leagh,* 1 Atk., 573, testator devised lands to his wife for life, remainder to his son R. in fee; and he gave to A. a legacy of £150 to be paid in twelve months after his son R. should come to enjoy the premises. The legacy to A. was held to be a charge, and it was decreed with interest from the death of the testator's wife, against R's son and heir. In *Ladd v. Carter,* Prec. Chan., 27, a devise of lands to A. for life, remainder to such child or children as should be living at his death and to their heirs, A. paying £40 to R. This was a charge, not only on A's estate for life, but also on the remainder. In the case now before us, the words immediately following the devise to John Aston are, 'he paying to my two nephews £100 each, at their ages of twenty-one years: But if it should so happen that they should be of age before John shall be in possession of the said plantation and lands, in that case he is not bound to pay under two years from the day of his taking possession.' It seems to us, that the £100 was not intended by the testator, to be a personal debt on the devisee, in remainder only; but it was to arise out of the land, after the devisee should get into the possession of the same, and he be able to make it out of the rents and profits—therefore it was a charge upon the land."

A devise to L. provided he pay E. three hundred dollars is a charge on the land. *Woods v. Woods,* 44 N. C., 290. The same construction was given the following clause in deed of conveyance: "For the consideration of $200 and the faithful maintenance of T. L. and wife P. L." *Laxton v. Tilly,* 66 N. C., 327. So as to a clause "reserving also the care and support" of the grantor's daughter. *Wall v. Wall,* 126 N. C., 405. In *Outland v. Outland,* 118 N. C., 138, the provision was this: "In consideration of the property I have given to Elijah and Cornelius, they are to have the care of and support Thomas, and it is my will that he should have his choice which of them he will live with, and the other pay half the expense." It was held to create a charge on the land. The following additional cases may be consulted: *Misenheimer v. Sifford,* 94 N. C., 592; *Carter v. Worrell,* 96 N. C., 358; *Hunt v. Wheeler,* 116 N. C., 422; *Allen v. Allen,* 121 N. C., 328; *Fleming v. Motz,* 187 N. C., 593; *Cook v. Sink,* 190 N. C., 620.

It is stated in the judgment that the appellants took their alleged title with notice of the charge upon the land. *Outland v. Outland, supra; Fleming v. Motz, supra.*

As pointed out in the judgment the deed to H. C. Marsh was executed to effect a family settlement, the conditions and terms being a part of the consideration. The provision for the support of his parents and afflicted sister is in effect a charge or equitable lien on the land.

No error.

MRS. OPAL PICKETT, ADMINISTRATRIX OF W. L. G. PICKETT, DECEASED, v. CAROLINA AND NORTHWESTERN RAILWAY, TOWN OF NEWTON AND W. C. WILKINSON.

(Filed 6 May, 1931.)

1. **Municipal Corporations E c—City is liable for injury caused by dangerous condition of street of which it has actual or implied notice.**

   A city is liable in damages to one whose personal injury or death is proximately caused by a dangerous condition of its streets of which the city had sufficient express or implied notice.

2. **Same—Evidence of implied knowledge of city of dangerous condition of street held sufficient.**

   Where a dangerous place in the street of a city has existed for a sufficient length of time to have been known by the city in the exercise of due care in inspection, the city will be held to have implied knowledge thereof, and where there is evidence that a dangerous condition in the street of a city had existed for about four months, and that the superintendent of public works of the city, in the course of his duties, passed thereover several times a day, it is sufficient evidence of notice by the city of such dangerous condition.

3. **Same—City is not relieved of liability for dangerous condition of street by fact that Highway Commission had taken over construction.**

   Where the State Highway Commission has taken over the construction of a street and bridge within the incorporated limits of a town, the town is not thereby relieved of liability for an injury proximately caused by a dangerous condition of the street at the bridge when the town has had implied notice of such condition which had existed for several months, C. S., 3846(j) providing that the State Highway Commission should assume full and exclusive responsibility for the maintenance of all roads forming a part of the State highway system expressly excepting from its provisions streets in towns and cities.

4. **Evidence D h—Evidence of other accident at place of injury held competent, the record disclosing that conditions were unchanged.**

   In an action to recover damages caused by an accident at a dangerous place in a city street where the street was under construction it is competent to show that other accidents had occurred at the same place, the record disclosing that the conditions had remained unchanged.

CIVIL ACTION, before *Shaw, J.*, at July Term, 1930, of CATAWBA.

The evidence tended to show that the Carolina and Northwestern Railway crosses a public street in the town of Newton; that an overhead bridge had been erected over the tracks of the railway company, and that said bridge was within the corporate limits of said town. Some time prior to 26 December, the State Highway Commission, under and by virtue of chapter 2, Public Laws of 1921, C. S., 3846(a), *et seq.*, had taken over for the purpose of paving and constructing said street as a part of the State highway system. The street had been improved to within several feet of the bridge. The distance between the termination of the concrete road and the bridge was variously estimated from fifteen to forty feet. Therefore, traveling the concrete road approaching the bridge when within fifteen to forty feet of the bridge, there was a drop or declivity of about five feet; that is to say, the concrete street was four or five feet higher than the dirt space between the end of the concrete street and the bridge. This drop or declivity, according to the evidence, sloped gradually from the end of the concrete street. The bridge was situated at an angle. Some of the witnesses testified that the angle was about twenty-five degrees. In other words a traveler moving along the concrete street, when he arrived at the termination of the concrete, would be compelled to make a sharp turn to get on the bridge, and the testimony tended to show that if the street were projected in a straight line it would not hit the bridge at all. The Highway Commission had placed various signs upon the street approaching the bridge. These sign boards were labeled "Danger." "Weak bridge." "One-way bridge." Another sign read, "Dangerous bridge." "Railroad bridge, very dangerous." "Traffic may proceed at owner's risk." Lanterns were attached to the signs at the bridge to give further warning of danger. This condition had existed for a period of about four months prior to the time of plaintiff's death.

On 26 December, 1928, at about 6:45 p.m., W. L. G. Pickett, who lived at Rich Square, North Carolina, was traveling through the town of Newton in a Chevrolet truck loaded with opera chairs, which he was transporting from Hickory, North Carolina, to Rich Square, North Carolina. The evidence tended to show that the lights or lanterns upon the bridge were not lighted on this particular night and that said Pickett in attempting to cross said bridge struck the corner of the bridge, causing him to lose control of his truck, which ran a few feet upon the bridge, turned over and caught fire, resulting in his death. There was other evidence tending to show that the runners or planks running across the bridge were cupped up and in a defective condition.

Plaintiff alleged and offered evidence tending to show that the sharp curve, the sudden drop or declivity on the hard-surfaced street, the absence of lights, and other defective approaches to the bridge, together with the fact that the bridge was placed at an angle to the street, produced a dangerous situation upon the street at the bridge. The town of Newton filed an answer alleging that the State Highway Commission was in control of said street and said bridge, and that the same was then under construction, and that, therefore, the town of Newton was charged with no responsibility for the maintenance and repair of said street and bridge.

At the conclusion of plaintiff's evidence the defendant railway company moved for judgment of nonsuit, and the motion was allowed by the court.

The town of Newton offered in evidence the complaint and decree in the case of Town of Newton *v.* State Highway Commission. The decree provided that the Highway Commission would take over and construct route No. 10 through the town of Newton.

The following issues were submitted to the jury:

1. "Was the death of plaintiff's intestate caused by reason of the negligence of the defendant, town of Newton, as alleged in the complaint?"

2. "If so, did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer?"

3. "What damages, if any, is the plaintiff entitled to recover?"

It does not appear how the issues were answered, but judgment was entered in favor of plaintiff and against the defendant, town of Newton, for the sum of $7,000, from which judgment the defendant town appealed.

Wilson Warlick, W. B. Councill and W. A. Self for town of Newton.
R. O. Everett, Justice C. Rudisill and Jno. W. Hester for plaintiff.

BROGDEN, J. When the State Highway Commission takes over a public street in an incorporated town for the purpose of constructing and maintaining same as a link in the State highway system, is such town thereby relieved from all liability for negligence to persons using said street?

As the State Highway Commission is a State agency it is not liable for negligence resulting in personal injury or death. *Carpenter v. R. R.,* 184 N. C., 400. Hence, if the town of Newton is not liable, then the motion for nonsuit as to it should have been granted.

A municipality owes certain specific and nondelegable duties to the public. These duties are summarized in *Willis v. New Bern,* 191 N. C., 507. There was ample evidence of the dangerous condition of the street at the bridge, and, upon the evidence, the bridge itself was a part of the highway. *R. R. v. McArtan,* 185 N. C., 201. In the *Willis case,* *supra,* the Court said: "It is further established by the decisions referred to that a municipal corporation is not an insurer of the safety of its streets, nor is any duty imposed upon it to warrant that the condition of its streets shall at all times be absolutely safe. Neither will the breach of such duties imposed warrant a recovery by the mere showing that a defect existed and that an injury has resulted proximately therefrom. It must be further shown that the governing authorities of the municipality had notice of the defect. This essential notice arises from: (1) Actual notice or knowledge directly imparted to the proper officials of the municipality; (2) implied, constructive or imputed notice. The principle creating and governing, implied, constructive or imputed notice is thus stated in Shearman & Redfield on the Law of Negligence, 6 ed., Vol. 2, sec. 369: 'Unless some statute requires it, actual notice is not a necessary condition of corporate liability for defect which caused the injury. Under its duty or active vigilance, a municipal corporation is bound to know the condition of his highways, and for practical purposes, the opportunity of knowing must stand for actual knowledge. Hence, where observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable diligence.' "

In the case at bar there was sufficient evidence of notice of the condition of said street. The superintendent of public works of defendant town testified that it was a part of his duty to keep the bridges of the town in proper repair and that in the course of his duties he passed over the bridge in controversy sometimes twice or three times a day.

Therefore, we have this situation: A portion of the street of the town was in a defective and dangerous condition, and the town had express notice thereof. Consequently, nothing else appearing, the town would be liable for all injuries received by travelers using said street proximately caused by such defects. But the defendant town, conceding the ordinary rule of law applicable to such a situation, contends that it is absolved from liability because of the fact that the Highway Commission had sole and exclusive control of said street at the time of the death of plaintiff's intestate. This contention, however, cannot be maintained.

The powers of the State Highway Commission, as originally created, are contained in chapter 2, Public Laws of 1921, and the amendments thereto. C. S., 3846, *et seq.* In section 10, subsection (g) of the Road Act of 1921, now subsection (g), C. S., 3846(j), it is provided that the State Highway Commission shall "assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads." Obviously, the road act did not relieve municipalities from responsibility for dangerous conditions or defects existing in streets forming a part of the State highway system, certainly after notice. Hence, the trial judge ruled correctly in declining to enter judgment of nonsuit. *Michaux v. Rocky Mount,* 193 N. C., 550.

Exception was taken to certain evidence tending to show other accidents at this bridge prior to the time of the death of plaintiff's intestate. The record discloses that the conditions existing at the bridge had remained unchanged for several weeks. Hence, the evidence was competent. *Conrad v. Shuford,* 174 N. C., 719; *Perry v. Mfg. Co.,* 176 N. C., 68; *McCord v. Harrison-Wright Co.,* 198 N. C., 743.

Upon the whole record, it is the opinion of the Court that the case has been correctly tried.

No error.

IN THE MATTER OF EVA R. BEAL.

(Filed 6 May, 1931.)

Trial G a: Appeal and Error J b—No appeal will lie from action of trial court in setting aside verdict in his discretion.

Where the trial court sets aside the verdict as a matter within his discretion no appeal will lie therefrom, and in such cases it is not necessary that he should find the facts.

CIVIL ACTION, before *Small, J.,* at October Term, 1930, of GUILFORD.

Sharp & Sharp for caveators.
Glidewell, Dunn & Gwyn for propounders.

PER CURIAM. The question of law involved appears from the following findings of fact and judgment entered by the trial judge:

"This cause came on for trial, and during the progress of the trial, and before more than one witness had completed her testimony it was suggested to the court by counsel present, that the propounder to the will was represented by counsel, to wit, Senator P. W. Glidewell, of Reidsville; that the court had previously inquired if the propounder was represented by counsel, and was informed by counsel for the caveator that he knew of no counsel representing the propounder.

That, during the progress of the trial, and when the court was informed that Mr. Glidewell represented the propounder, the court informed counsel for the caveator of this fact and told counsel for the caveator that the court would allow him to proceed, but that if it afterwards developed that the propounder was represented by counsel, that the court would probably set aside the verdict.

The court finds as a fact that P. W. Glidewell is a practicing attorney of Reidsville, North Carolina, and is a regular practicing attorney in the county of Guilford, and that said Glidewell had not received a copy of the calendar upon which the case was calendared for trial, and that said Glidewell appeared within about two hours after the verdict of the jury and made a motion to set aside the verdict, stating that he was the regularly retained counsel for the propounder. The court so found as a fact all of the above as stated, and set aside the verdict in the court's discretion, and refused to sign the judgment tendered by counsel for the caveator."

From the foregoing it appears that the judge set aside the verdict in his discretion. In such cases it is not necessary to find the facts, and the judgment is affirmed upon authority of *Bird v. Bradburn,* 131 N. C., 488; *Abernethy v. Yount,* 138 N. C., 337; *Likas v. Lackey,* 186 N. C., 398.

Affirmed.

W. D. BETHELL v. B. F. LEE.

(Filed 13 May, 1931.)

Process B c—Statutory requirements of affidavit for service by publication held substantially complied with in this case.

Our statute allowing service of summons by publication, C. S., 484, providing among other things that it be made to appear to the satisfaction of the court by affidavit that the person to be served "cannot after due diligence be found in the State" is in derogation of the common law, and its requirements must be substantially complied with, and *held:* where the summons has been duly returned "defendant not to be found in the State," and at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the State, and was a resident of another State, the statute was substantially complied with and the validity of the service is upheld.

CIVIL ACTION, before *Finley, J.*, at November Term, 1930, of ROCKINGHAM.

The evidence tended to show that on 4 June, 1921, B. F. Lee instituted a civil action against George W. Bethell. On 6 June, 1921, the sheriff returned the summons with the following entry: "Not to be found in Rockingham County." On the same day the plaintiff filed a complaint alleging "that the defendant is a resident of the State of Virginia, residing in the city of Norfolk." And further, "that the defendant, George W. Bethell, is indebted to the plaintiff in the sum of $4,218.50, and interest thereon from 1 July, 1920; that no part of said debt has been paid to satisfy the entire amount, but the entire amount is still due and owing to the plaintiff by the defendant; that there are no offsets or counterclaims in favor of defendant and against the plaintiff on account of said debt." On the same day the plaintiff Lee made an affidavit as follows: "That he is about to commence an action against the above-named defendant for the purpose of recovering $4,218.50, with interest from 1 July, 1920; that the said defendant is a nonresident of the State of North Carolina and is beyond the reach of process issuing from the courts of said State." On the same day the plaintiff Lee filed another affidavit as follows: "That George W. Bethell, the defendant, is justly indebted to B. F. Lee, the plaintiff, in the sum of $4,218.50, with interest from 1 July, 1920, as nearly as he can ascertain same over and above all discounts, setoffs and counterclaims which the said defendant has against him, which said debt arose from breach of contract on the part of the defendant, whereby the said defendant failed and refused to pay the plaintiff and his assignor the said sum of $4,218.50, with interest from 1 July, 1920, which said sum of money was due this plaintiff and his assignor for money paid by the plaintiff and his assignor to the use of defendant; that the said George W. Bethell is a nonresident of the State of North Carolina and has been for several years; that the said George W. Bethell is the owner of certain real estate situated in the State of North Carolina, the value of which being sufficient to satisfy the claim of this plaintiff. Wherefore, this plaintiff prays the court for a warrant of attachment authorizing the seizure under said attachment of any and all property owned by the said George W. Bethell to the end that the claims of this plaintiff may be satisfied."

Thereupon, on 6 June, 1921, the clerk of the Superior Court made the following order: "It appearing to the court from the affidavit of the plaintiff filed in the above-entitled cause that the defendant, George W. Bethell, is a nonresident of the State of North Carolina, and is beyond the reach of process issuing from the courts of this State, and it further appearing from said affidavit that the said B. F. Lee has a good cause of action against the said Geo. W. Bethell:

It is, therefore, ordered that notice of this action be published once a week for four weeks in *Madison Messenger,* a newspaper published in Rockingham County, setting forth the title of the action and stating the names of the parties and amount of the claim, the issuing of the attachment and a brief recital of the subject-matter and nature of the suit, and requiring the defendant to appear before the clerk of the Superior Court of Rockingham County, at his office in Wentworth, on 12 July, 1921, and answer or demur to the complaint of the said plaintiff."

It appears that a proper notice of summons and warrant of attachment was duly published as required by law.

Thereafter, on 7 January, 1924, the clerk of the Superior Court entered the following judgment: "This cause coming on to be heard before the undersigned, and it appearing that the defendant has been properly served with notice of this action by publication as provided for by law, and it further appearing that the plaintiff has filed a duly verified complaint, and that from said complaint it appears that the defendant is indebted to the plaintiff in the sum of four thousand two hundred eighteen and 50/100 dollars, with interest from 1 June, 1921, a warrant of attachment was issued against the property of the defendant, and that pursuant to said warrant of attachment on the following described tract of land: Lying and being in Ruffin Township, Rockingham County, State of North Carolina, and containing 356 acres, and adjoining the lands of J. M. Walsh, the Alverson Place, and the lands of Charlie Yates, and being known as the Chandler Mill Tract. The part of the said land of which was levied on being all the right, title and interest of George W. Bethell. It is, therefore, ordered, considered and adjudged that the plaintiff recover of the defendant the sum of four thousand two hundred eighteen and 50/100 dollars, and interest from 1 July, 1930, and the costs of this action. And it is further ordered, considered and adjudged that this judgment is a specific lien on the above-described tract of land as to all right, title and interest of the said defendant, George W. Bethell, and it is further ordered, considered and adjudged that execution be issued against said land to satisfy said judgment."

Subsequently, on 10 August, 1929, George W. Bethell and wife conveyed his interest in the land described in the judgment in the case of Lee *v.* Bethell, to W. D. Bethell, the plaintiff in the present action, and this deed was duly recorded. Thereafter, on 11 November, 1929, the plaintiff, W. D. Bethell, brought the present suit against B. F. Lee, alleging that the judgment of Lee *v.* Bethell, rendered on 7 January, 1924, was irregular, null and void; that the attachment in said action was irregular and void, and that the said judgment constituted a cloud upon plaintiff's title. Wherefore, he prays that the judgment entitled B. F. Lee *v.* George W. Bethell be canceled and declared null and void."

When the cause came on for hearing the record disclosed that the court was of the opinion that the affidavits offered in the attachment suit of Lee *v.* Bethell "were insufficient as a matter of law, upon which to base an order for summons to be made by publication and to issue warrant of attachment." The court further charged the jury that if they believed the evidence they would answer the issues in favor of plaintiff.

Upon the verdict, judgment was rendered that the warrant of attachment in the action of B. F. Lee *v.* George W. Bethell "with its purported or attempted service, is void and of no legal force and effect and that the same likewise be canceled and held for naught." It was further ordered that the judgment and attachment proceeding cast a cloud upon plaintiff's title and said proceedings were ordered stricken from the record.

From judgment so rendered the defendant appealed.

Wm. Reid Dalton for plaintiff.
Glidewell, Dunn & Gwyn for defendant.

BROGDEN, J. The vital question of law presented by the record is whether the attachment proceedings in the case of F. B. Lee *v.* Geo. W. Bethell were valid.

Attachment is a statutory remedy in derogation of common law, and hence must be strictly construed. Notwithstanding, substantial compliance with the requirements of the statute is sufficient. *Best v. British & American Co.,* 128 N. C., 351; *Page v. McDonald,* 159 N. C., 38.

It is to be noted that the summons in the attachment suit was returned by the sheriff "not to be found in Rockingham County." Nothing else appearing, this return would be insufficient to support a service of summons by publication because C. S., 484, requires that it must appear to the satisfaction of the court by affidavit that the person to be served "cannot after due diligence be found in the State." *Sawyer v. Drainage District,* 179 N. C., 182. But was a summons necessary in the first instance? The record discloses that at the time of instituting the suit on 4 June, 1921, the plaintiff Lee filed a verified complaint and two affidavits. The verified complaint alleges that the defendant, Geo. W. Bethell, was a resident of the State of Virginia, residing in the city of Norfolk. In one affidavit it was stated that said defendant was a "nonresident of the State of North Carolina and is beyond the reach of process issuing from the courts of said State." In another affidavit filed at the same time, it was stated "that the said Geo. W. Bethell is a nonresident of the State of North Carolina and has been for several years."

The principle of law applicable to such facts is clearly stated by McIntosh in North Carolina Practice and Procedure, section 800, page 926, as follows: "But where it clearly appears to the court, by affidavit, that the defendant is nonresident and cannot be personally served, the affidavit and order for publication will take the place of the summons, and this to be followed by seizure of property, and publication gives the court jurisdiction, without going through the useless formality of issuing a summons and having the sheriff make the return that the defendant is not to be found." The text is wholly supported by the au-

thorities cited, to wit: *Grocery Co. v. Bag Co.*, 142 N. C., 174; *Mills v. Hansel,* 168 N. C., 651; *Jenette v. Hovey & Co.*, 182 N. C., 30. See, also, *Mohn v. Cressey,* 193 N. C., 568; *Lemly v. Ellis,* 143 N. C., 200; *Hess, Rogers & Co. v. Brower,* 76 N. C., 428; *Luttrell v. Martin,* 112 N. C., 593.

The affidavit in the case at bar states that the cause of action is for breach of contract for money had and received; that the defendant had been a nonresident of the State for several years and is a resident of the State of Virginia and not subject to the process of the courts of North Carolina. The notice of summons and warrant of attachment states that the cause of action is to recover a specific sum for money had and received, and also sets out the time and place of the return of summons and warrant of attachment.

Upon the whole record the court is of the opinion that a substantial compliance with the statutes is disclosed and the judgment is

Reversed.

NETTIE MERRITT GRIER v. JAY L. WOODSIDE AND HOWARD WOODSIDE.

(Filed 13 May, 1931.)

1. **Parent and Child A a—Liability of parent for negligent driving of automobile by minor son is governed by "family car" doctrine.**

The father is not ordinarily liable for the torts of his minor son by reason of the relationship, and his liability must be predicated upon some principle of agency or employment, and where the son causes injury while driving his father's automobile the theory of agency is determined by the "family car" doctrine.

2. **Same—Where son uses father's automobile with consent and approval of father the "family car" doctrine applies.**

Where a parent owns an automobile for the convenience and pleasure of his family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the parent will be held responsible for the negligence of the son causing injury to another.

3. **Same—Consent of father to use of car by son may be implied from circumstances, and in this case it is held a question for the jury.**

The consent of the parent to the use of his family automobile by the son for the sole purpose of the latter may be implied from the circumstances, such for example, as the habitual or customary use for his own purposes by the son, and where there is evidence to this effect the testimony of the father that at the time of purchasing the car he told his son not to use it without his consent raises the question of the implied consent of the father as against the father's motion as of nonsuit.

4. **Trial E g—Instruction in this case held not to contain prejudicial error.**

An instruction of the trial judge to the jury upon the liability of a father under the "family car" doctrine for his minor son's negligence in causing an injury to another is not held for prejudicial error in this case because of the use of the words "driven by the son on various occasions," it being admitted that the son had been driving the car for more than two years, and it thus appearing that the jury must have understood he was referring to his habitually and customarily driving it.

5. **Evidence C a—Where plaintiff makes out prima facie case the burden of going forward with the evidence is properly placed on defendant.**

Where in an action against a father for the negligent driving of his automobile by his minor son the court charges the jury that where the plaintiff has introduced evidence that the son habitually and customarily used the car with his father's consent, that the burden was upon the father to show that on the particular occasion in suit the son was driving without his consent, is not error, the instruction in effect placing the burden of going forward with the evidence on the defendant after the plaintiff, upon whom was the burden of proof, had made out a prima facie case.

APPEAL by defendants from *Harding, J.*, at Spring Term, 1931, of MECKLENBURG. No error.

The plaintiff brought suit to recover damages for personal injury resulting from the collision of her automobile with one driven by the defendant, Howard Woodside. The defendant, Jay L. Woodside, was the owner of the car and Howard Woodside, 18 years of age, is his son. On 31 May, 1930, at about 6 p.m. the plaintiff was driving her car in an easterly direction on Templeton Avenue in the city of Charlotte, and Howard Woodside was driving his father's car in a southerly direction on Euclid Avenue. At the intersection of the two avenues a collision of the cars occurred, resulting in injury to plaintiff and damage to her car. The various acts of alleged negligence are set out in the complaint.

The defendants, admitting that Howard Woodside was a minor and that his father owned the car, denied all the allegations of negligence and pleaded contributory negligence of the plaintiff in bar of her recovery. The following verdict was returned:

1. Was the plaintiff injured and damaged by the negligence of the defendant, Howard Woodside, as allegd in the complaint? Answer: Yes.

2. If so, is the defendant, Jay L. Woodside, responsible for and chargeable with such negligence? Answer: Yes.

3. Did the plaintiff, by her own negligence, contribute to her injury, and damage as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover? Answer: $2,150.

Judgment was rendered for the plaintiff and the defendants appealed, assigning error.

John M. Robinson and Hunter M. Jones for plaintiff.
C. H. Gover for defendant.

ADAMS, J. There was no error in overruling the defendants' motion for nonsuit. Indeed, the negligence of the son is not in controversy. The matters in dispute are the alleged liability of the father and a question of error in the charge to the jury.

This Court has held that the owner of an automobile is not liable in damages for injury resulting from its negligent operation merely because of his ownership, and that as a rule a father is not liable for the torts of his minor son. *Brittingham v. Stadiem,* 151 N. C., 299; *Linville v. Nissen,* 162 N. C., 95; *Taylor v. Stewart,* 172 N. C., 203. In such cases liability for the son's negligence will ordinarily be imputed to the father only on some principle of agency or employment. *Wilson v. Polk,* 175 N. C., 490; *Bilyeu v. Beck,* 178 N. C., 481; *Robertson v. Aldridge,* 185 N. C., 292. But with respect to the use of automobiles this principle must be considered in connection with the family-purpose doctrine, which has been adopted as the law of this jurisdiction. *Williams v. May,* 173 N. C., 78; *Clark v. Sweaney,* 176 N. C., 529; *Tyree v. Tudor,* 181 N. C., 214; *Allen v. Garibaldi,* 187 N. C., 798; *Watts v. Lefler,* 190 N. C., 722; *Plott v. Howell,* 191 N. C., 832; *Goss v. Williams,* 196 N. C., 213. A concise statement of the doctrine is set out in *Robertson v. Aldridge, supra:* "Where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect."

Under this doctrine the question of liability does not depend on the relation of parent and child; the question is whether the child was using the car for one of the purposes for which it was provided. Hence, the consent of the parent need not be express; it may be implied from circumstances, such, for example, as the habitual or customary use of the car. *Wallace v. Squires,* 186 N. C., 339.

In the case before us there was evidence tending to show that Jay L. Woodside had owned a Franklin car for more than two years; that the son had driven it during this period on an average of once or twice a week with his father's consent; that he was living with his father as a member of the family; and that the car was used for family purposes. There was evidence that Jay L. Woodside came home at five in the afternoon and parked the car in the driveway; that while he was in his house his son took charge of the car and started to a pressing club for a suit of clothes, and that soon afterwards he got information of the collision.

True, the father testified that when he bought the car and perhaps at other times he told his son not to use it without his consent; but the record discloses circumstances from which the jury was fully warranted in finding that the son was using the car at the time of the collision with the implied consent of his father. The doubt was a matter for the jury, and should not be resolved against the plaintiff as a conclusion of law.

The defendants complain of an instruction relating to the family purpose doctrine in which the court referred to the son's use of the car on "various occasions" instead of his habitual or customary use of it; but, considering the instruction in view of the admitted fact that the son had been driving the car for two years, we are of opinion that the jury could not have been prejudiced or misled.

An exception was taken to the following instruction: "So, under our law when it is shown that the son on various occasions has driven an automobile belonging to his father, with his knowledge and with his consent, with his permission and with his authority, that is sufficient to carry it to the jury and the burden shifts to the defendant, the father in this case, to explain the relationship and to show he did not have authority on that particular occasion."

We do not understand this instruction in any way to change the burden of the issue. The judge had previously told the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that at the time of the collision Howard Woodside was acting as agent of his father. The evident meaning of the instruction is that after the introduction of evidence sufficient to carry the case to the jury, it was encumbent upon the defendant to go forward with evidence tending to rebut the prima facie case made by the plaintiff in this respect. The question has been frequently discussed and in view of our decisions, we deem it unnecessary to review the cases in which the point has been presented. *White v. Hines,* 182 N. C., 275.

No error.

HUGH JOHNSTON, BY HIS NEXT FRIEND, v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 13 May, 1931.)

1. **Insurance N b—Policy covering car while being used by employees in employer's business does not cover car when used for employee's purpose.**

The provisions of an automobile liability insurance policy with an "omnibus coverage clause" extending its coverage to employees of the insured while using the cars of the insured and engaged in the performance of its business, does not extend to the use of such cars by an employee for purposes unrelated to or independent of the business of the insured, as in this case the use of the car by the employee after business hours for purposes exclusively his own.

2. **Insurance E b—Where language limiting insurer's liability is not ambiguous it may not be construed to enlarge liability.**

Where the language of a policy of insurance is ambiguous or susceptible of more than one construction, it should be given that construction favorable to the insured, but where the insurer's liability is limited by unambiguous language, the policy, as a rule should not be construed to enlarge the liability beyond the plain meaning of its terms.

APPEAL by plaintiff from *Harding, J.*, at February Term, 1931, of MECKLENBURG. Affirmed.

This case was heard upon an agreed statement of facts. The defendant is a corporation engaged in the business of writing liability insurance on automobiles, and on 1 April, 1928, executed and delivered to the C. D. Kenny Co., Inc., one of its liability insurance policies. On 22 December, 1928, J. B. Hirst, an employee of the Kenny Company, while driving the car referred to in the insurance policy negligently damaged a car of the plaintiff, who brought suit against Hirst and the Kenny Company, but recovered only against Hirst a judgment for $435, with interest and costs. An execution was issued on the judgment and returned unsatisfied, Hirst being insolvent. At the time of the accident the insurance policy was in force and effect. Hirst had customarily used the car in going from and returning to his home, morning and evening. He kept it at his house during the night. In going to and from home after and before work he was legally in possession of it and used it with the knowledge and consent of the Kenny Company. When the collision and consequent damage occurred, Hirst was driving the car without the knowledge of the Kenny Company on the Derita road about 10 o'clock at night in company with a woman whom he had taken up at the City Library about 6 o'clock. He was engaged in "business entirely his own and without the knowledge of the Kenny Company." The Derita road is north of the city limits. Hirst lived in the south-eastern section of the city of Charlotte, known as Dilworth. He was a traveling salesman for the Kenny Company and used the car in his work for the company. When he took the woman in his car he had finished his work for the day. The policy of insurance is set out in the record.

Upon the agreed facts Judge Harding adjudged that the plaintiff take nothing by his action and recover his costs. The plaintiff excepted and appealed.

G. T. Carswell and Joe W. Ervin for plaintiff.
J. Laurence Jones and J. L. Delaney for defendant.

ADAMS, J. The policy of insurance contains an "omnibus coverage" clause in which the defendant agreed "to extend the insurance, subject to the limits expressed in statement 6 of the schedule, so as to be available in the same manner and under the same conditions as it is available to the named assured (C. D. Kenny Company, Inc.), to any person or persons while riding in or legally operating any of the automobiles described in the schedule and to any person, firm, or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured," etc. Statement 6 of the schedule provides that the liability of the defendant shall not exceed the amounts named in subsections a, b, and c, respectively.

The plaintiff takes the position that this clause extends the insurance to Hirst, and that the defendant is liable in damages to the plaintiff in the amount of his judgment. The defendant contends that the "omnibus coverage" clause, purporting to extend the insurance to certain persons therein referred to, is subject to the exclusions set out in the policy under Condition A, among which is this provision: "This policy does not cover any automobile while being used in any business, trade, or occupation other than described in statement 8 of the schedule." Statement 8 is as follows: "The occupation or business of the assured is wholesale and retail teas, coffees, and sugars."

The controversy, it will be observed, is reduced to the compass of a single question: Under the terms of Condition A and statement 8 does the policy cover the car in question while being used by Hirst for his own convenience or pleasure without the knowledge of the Kenny Company, and on "business entirely his own" and utterly unrelated to his employer's business and to his duties as its traveling salesman? In our opinion the question should be answered in the negative and the judgment of the trial court should be affirmed.

As authority for his position the plaintiff cites *Dickinson v. Maryland Casualty Co.*, 101 Conn., 369, 41 A. L. R., 500; *Peterson v.*

Maloney (Maryland Casualty Co., Garnishee), 232 N. W. (Minn.), 790, and *Stovall v. New York Indemnity Co.,* 8 S. W. (2nd) (Tenn.), 473; but neither of these cases is decisive of the question presented in the present appeal. In the first two, the clause purporting to extend the insurance so as to be available to certain persons in like manner and under the same conditions as it is available to the named assured, is substantially the same as that of the policy under consideration. Yet, there is a marked difference between this policy and the policies construed in the *Dickinson case* and the *Peterson case.* The crucial distinction is this: Condition A and statement 8, above set forth, do not appear in the latter policies. In the *Stovall case* the determinative question, as stated in the opinion, was whether at the time of the accident the employee was using the automobile with the permission of his employer.

We recognize the established principles that a policy of insurance, if the language is ambiguous or susceptible of more than one interpretation, should be given a construction favorable to the assured, and that if the insurer's liability is limited by unambiguous language the policy, as a rule, should not be construed to enlarge the liability beyond the plain meaning of its terms. *Gant v. Ins. Co.,* 197 N. C., 122; *McCain v. Ins. Co.,* 190 N. C., 549. In the case before us the "omnibus coverage" clause extending the insurance to persons other than the named assured is limited by the provision that the policy shall not cover any automobile while being used in any business, trade, or occupation except the occupation or business of dealing in teas, coffees and sugars. The phrase, "while being used," has reference to the time of the casualty; and obviously at that time the car was not being used in the employer's business. Judgment

Affirmed.

UNION INDEMNITY COMPANY v. HENRY D. PERRY.

(Filed 13 May, 1931.)

1. **Evidence D f—Evidence to be admissible as corroborative evidence must be introduced after testimony sought to be corroborated.**

   Corroborative evidence must be of evidence already introduced at the trial to be admissible on that ground.

2. **Appeal and Error J e—Where same evidence has been admitted without objection, exception thereto will not be sustained on appeal.**

   Where on cross-examination evidence is erroneously admitted over exception it will not be held for reversible error if brought out by appellant on his redirect examination.

3. **Same—Refusal of court to submit issue tendered held not reversible error in this case.**

Where the amount alleged to be due by contract is a mere matter of calculation from the other undisputed evidence in the case, the refusal of the court to submit an issue tendered thereon is not reversible error, where the controversy is determined by the answer of the jury to the issue submitted.

CIVIL ACTION, before *Small, J.*, at October Term, 1930, of GUILFORD.

The facts surrounding the controversy are stated in the former appeal in this case, reported in 198 N. C., 286.

This cause was tried upon the following issue: "Was the extra work done under the original contract between the parties?" The defendant excepted to the issue submitted and tendered the following issue: "What amount, if any, is the defendant, Henry D. Perry, due and owing to the plaintiff, Union Indemnity Co?"

The defendant offered evidence tending to show that he completed the work specified in the original contract and had moved his machinery and road force to another location, and that thereafter the authorities of the city of High Point requested him to do additional work; that after going over the proposition he consented to do said work, and that the additional work was done under a new and distinct contract with the city, for which no bond was required or given.

The jury answered the issue "Yes," and from judgment upon the verdict the defendant appealed.

Manly, Hendren & Womble and Kenneth M. Brim for plaintiff.
King, Sapp & King for defendant.

BROGDEN, J. The first witness for plaintiff was asked the following question on cross-examination by the defendant: "And that is all that he (Perry) ever contracted to pay, and that is what he told you, wasn't it?" The witness would have answered "Yes," but upon objection of plaintiff the question and answer were excluded, and the defendant excepted. This exception is not sustained for the reason that the contract was in writing and the amount to be paid was specified in the instrument. Neither was the evidence competent at the time it was offered to corroborate the defendant Perry for the reason that Perry had not then been examined as a witness or offered any testimony as to the transaction.

The plaintiff offered the city engineer as a witness and propounded the following question: "Mr. Taplin, state whether or not in July, 1925, at the time of the letting of this contract, if you as city engineer for the city of High Point, contemplated the construction of additional water and sewer extensions to that estimated in the contract?" The witness answered, "Yes, sir, I did." The defendant excepted to the question and answer upon the theory that the city engineer had not communicated to the defendant the fact that other work was contemplated at the time of the letting. However, on redirect examination by the plaintiff, witness testified without objection: "At the time this contract of July, 1925, was let, this public letting, I had in mind to do other work of the same kind for the city. The council told me to get prices on water lines and that they might give it to Mr. Perry and they might not. . . . When the bidders, including Mr. Perry, came over there to bid on the work they asked me if I thought there would be more work. I replied that I thought there would be, but to what extent I could not say."

The foregoing testimony of witness not having been elicited on cross-examination, and no objection having been taken thereto, even if his former testimony was incompetent, the exception cannot be sustained. *Shelton v. R. R.,* 193 N. C., 670.

The defendant in apt time objected to the issue submitted to the jury and tendered an issue as to indebtedness which the court declined to submit. The opinion of the Court upon the former appeal in 198 N. C., 286, did not undertake to frame issues for the trial of the cause, but rather to state the propositions of law involved in the appeal. The amount of work done under the contract, whether performed under the original written contract or in pursuance of a subsequent verbal contract, produced a clear cut issue of fact, and nothing else appearing, the defendant's exception to the failure of the court to submit an issue of indebtedness would be sound and maintainable, but the record tends to show that the amount of work done was not in controversy. It was alleged in the complaint that the amount of extra work done was $161,815.48, and the amendment to the answer seems to recognize the correctness of the amount stated. Furthermore, it was stipulated by counsel for both parties that the statement of estimates made by the city engineer for work done from 25 July, 1925, to 8 March, 1927, and offered at the trial was correct. These estimates showed the amount of work done amounted to $219,763.88. The original contract in writing provided for work amounting to $57,948.40. The difference between these two amounts is $161,815.48. Therefore, the amount of indebtedness was exclusively a matter of calculation, and hence the exception cannot be sustained.

Exceptions were also taken upon the ground that the court did not correctly instruct the jury, but an examination of the entire charge fails to produce a conviction of error, and the judgment is affirmed.

No error.

STATE v. HERMAN STEADMAN, MASS ATKINS AND STELL CALDWELL.

(Filed 13 May, 1931.)

1. **Criminal Law L e—Error, if any, in the admission of evidence in this case is held not to be prejudicial.**

   Where the identity of the defendant in a criminal action as the one who committed the offense is in question, and a witness has testified to the identity of the defendant to the best of his knowledge, and the State has introduced an affidavit of the witness positively identifying the defendant, and the judge instructs the jury not to regard the affidavit as substantive evidence, but merely corroborative evidence if they found that it was corroborative: *Held*, the admission of the affidavit in evidence, if error, was not prejudicial.

2. **Criminal Law I g—In this case held: exception was to failure to give subordinate elaboration in charge requiring request for instructions.**

   The failure of the trial court in his charge to the jury to define the term "satisfied beyond a reasonable doubt," and to charge as to the presumption of innocence will be considered as a failure to charge as to subordinate elaboration, and will not be held for reversible error, in the absence of a special request by the defendant.

APPEAL by Herman Steadman and Mass Atkins from *Harding, J.*, and a jury, at September Term, 1930, of POLK. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Thomas L. Johnson and Shipman & Arledge for defendants.

CLARKSON, J. Frank Ballew, the prosecuting witness for the State, testified as to the robbery from his person and the identity of the appealing defendants. Oscar Pate also testified for the State as to the identity of Mass Atkins, whom he had known for three or four years, in the following language: "I took one of them to be Mass Atkins. . . . After I saw Mass Atkins and the other man in the woods, . . . the man I thought was Mass Atkins. . . . I can swear to the best of my knowledge it was him." Oscar Pate also testified to certain other facts relative to the identity of Mass Atkins, the car he was driving, something in his hand looked like a pistol, and another person with him, and described the appearance of the other person—this near the scene of the crime and shortly after the commission. The State then introduced an affidavit of Oscar Pate setting forth the above facts and a definite statement as to it being Mass Atkins. "I swear it was Mass Atkins." The defendants objected, the objection was overruled and defendants excepted and assigned error.

In regard to this definite statement, Oscar Pate testified: "That is the affidavit I signed, all but one statement. I mean there is a statement in there that I did not make. Mr. Leonard says that I swore positively that I saw Mass Atkins, and I told Mr. Leonard that it was Mass Atkins to the best of my knowledge."

The court: "This affidavit has been offered in evidence by the State. It is not admitted as any evidence at all of any fact that is in that affidavit, but only admitted for your consideration in corroboration of what the witness has already testified to, if it does so corroborate."

There were other facts in the affidavit that did corroborate Pate. The fact that on the trial he did not go as far as to the identity of Mass Atkins as in the affidavit and the court's instruction to the jury in regard to the affidavit, if error, we cannot hold as prejudicial. He reneged in regard to the positive statement in the affidavit, and his testimony on the trial was less damaging to Mass Atkins. Then again, he said that the positive statement was incorrect. All this was favorable to Mass Atkins. The facts here are different from *S. v. Melvin,* 194 N. C., 394. See *Clay v. Connor,* 198 N. C., 200.

The charge of the court below is not subject to criticism for that the court did not define "Satisfied beyond a reasonable doubt," and that the defendant is presumed to be innocent. No prayer for instruction was requested. *S. v. Boswell,* 194 N. C., 260. We can see no error in the charge of the court below in regard to the law applicable to good character, nor that applicable to an alibi. No prayer for instruction was requested as to the evidence in regard to defendant's character as in *S. v. Morse,* 171 N. C., 777. The court below fully set forth the facts and contentions in the charge as to the alibi set up by defendants. *S. v. Melton,* 187 N. C., 481.

In *Bank v. Rochamora,* 193 N. C., at p. 8, quoting numerous authorities, the law is thus stated: "Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it." This applies to subordinate elaboration, but not substantive, material and essential features of the charge. C. S., 564; *McCall v. Lumber Co.,* 196 N. C., at p. 602; *Moss v. Brown,* 199 N. C., at p. 192.

In the present case the matters complained of by defendants, except the alibi which was fully explained in the charge, were not substantive, material or essential features of the charge, but subordinate elaboration, and prayers for instruction should have been requested.

The question of the identity of defendants was one for the jury to decide; there was ample evidence on the record of an alibi, but this was not believed by the jury. In law we find

No error.

J. T. FLINCHUM v. R. A. DOUGHTON, CHAIRMAN, ET AL.

(Filed 13 May, 1931.)

1. **Trial C c—In this case held: defendant was deprived of substantial rights contrary to usual course and practice of courts.**

   Where proceedings against the State Highway Commission for damages for the taking of petitioner's land have been had without notification to the Commission as to the appointment of appraisers, confirmation of the appraisers' report and transfer of the issue to the civil issue docket for trial, an order of the court continuing the trial for the defendant's attorneys not being able to attend at the time set for trial upon condition that defendant waive technical objections, pay costs, etc., is contrary to the usual course and practice of the courts.

2. **Judgments F e—Conditional or alternative judgments or orders are void.**

   An order of continuance of the trial of an action providing that upon the performance of certain conditions the action should remain upon the civil issue docket for trial, otherwise the judgment of the clerk appealed from to be affirmed, is not self-executing, and will be declared void.

APPEAL by defendant from *Stack, J.*, at February Term, 1931, of MOORE.

Special proceeding to assess damages to petitioner's lands alleged to have been taken by the State Highway Commission in the location and construction of Highway No. 74.

Summons was issued 1 December, 1930, returnable thirty days after date of service, and was served, together with the petition, 2 December following. Answer to the petition was filed 10 December, and on 29 December, or three days before the expiration of the return day, without notice and in the absence of the defendant, the clerk entered an order appointing appraisers, but without designating when they should meet.

Five days thereafter, to wit, on 3 January, 1931, the appraisers met without notice to the defendant, awarded damages to the petitioner in the sum of $1,500, found that there were no "special benefits" and failed to consider the question of general benefits. Notice of this appraisal was received by the defendant 6 January, 1931. Exceptions to the appointment of the appraisers, to the meeting of the appraisers, and to the award of the appraisers were filed 7 January. It appears from the record, however, that on 5 January, without notice to the defendant, the clerk had already entered judgment confirming the report of the appraisers.

Without any ruling on the defendant's exceptions, the cause seems to have been transferred to the civil issue docket, and was calendared for trial at the February Term, 1931, Moore Superior Court.

Counsel for the defendant being unable to attend the February Term of court, due to conflicting engagements, and failing to secure a continuance by consent, wired the presiding judge asking that the case be continued for the term. This was granted upon the following conditions:

"That the defendants waive all technical objections in the procedure, and particularly the lack of notice claimed in the motion, and the further express condition that the defendants pay the costs of this proceeding up to and including the present term of court. Upon the failure of the defendants to comply with the foregoing conditions the judgment before the clerk will stand affirmed, and upon a waiver of the alleged irregularity and upon payment of the costs as aforesaid the action will stand regularly for trial upon the issues raised in the pleadings."

From this order the defendant appeals, assigning error.

No counsel appearing for plaintiff.
Charles Ross for defendant.

STACY, C. J. The defendant's exceptions have not been passed upon either by the clerk or the judge, and under the order of continuance substantial rights are required to be waived to obtain a hearing of any kind. This is contrary to the usual course and practice of the courts. *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716. Furthermore, the order in question is not self-executing, and its terms are conditional. *Church v. Church,* 158 N. C., 564, 74 S. E., 14. "Alternative or conditional judgments are void." *Lloyd v. Lumber Co.,* 167 N. C., 97, 83 S. E., 248.

The order will be vacated, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error.

WILLARD WILLIAMS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 13 May, 1931.)

1. **Wills E c—Devise in this case held to create fee simple under the rule in Shelley's case, subject to be defeated by happening of event.**

A devise to the grandson of the testator to have and to hold during the term of his natural life, and no longer, and after his death to his bodily heirs in fee simple, but if he should die without issue, the remainder over to designated persons, creates a fee simple in the grandson under the rule in *Shelley's case,* subject to be defeated upon his death without issue.

2. Estoppel A a—Deed in this case would operate to estop grantors from denying that grantee was seized of the estate.

Where under a devise of lands the first taker acquires a fee simple subject to be defeated upon the happening of a certain event, a quit-claim deed from the ulterior remaindermen to him, although the deed may not contain technical covenants of title, will estop the grantors from denying that the grantee became seized of the estate the deed purported to convey.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1930, of WILSON. Affirmed.

C. H. Bain for appellant.
Finch, Rand & Finch for appellee.

ADAMS, J. This is a controversy without action involving the construction of the following paragraph in the will of N. W. Williams, deceased: "I give and devise to my grandson, who has not been named, the son of my deceased son, Bug Williams, that certain tract or parcel of land lying and being situate in Old Fields Township, Wilson County, N. C., adjoining the lands of Delphia Eatman, I. C. Eatman, J. L. Eatman and others, containing 100 acres, more or less, and known as the J. Frank Eatman home place. To have and to hold the above described tract of land to the said son of my deceased son, Bug Williams, for and during the term of his natural life, and no longer, and after his death to his bodily heirs, in fee simple, but in the event he dies without issue, then and in that event I give and devise the same to Plummer Williams and Wiley Williams, their heirs and assigns, in fee simple. I direct that this tract of land shall be rented out each year at public auction to the highest bidder during his minority."

The devise to Willard Williams, the grandson named in the will, for his natural life and after his death to his bodily heirs in fee simple, passes the fee under the rule in *Shelley's case,* subject to be defeated in the event of his death without issue. *Roberson v. Griffin,* 185 N. C., 38; *Benton v. Baucom,* 192 N. C., 630; *Foley v. Ivey,* 193 N. C., 453; *Waddell v. Aycock,* 195 N. C., 268; *Martin v. Knowles, ibid.,* 427; *Bradley v. Church, ibid.,* 662.

But as the devisees designated in the ulterior limitation, Plummer Williams and Wiley Williams, have released by a quit-claim deed all their right and title to the land in controversy, the limitation over is eliminated, and Willard Williams, who is now of age, has the title in fee. Where a grantor executes a deed in proper form intending to convey his right, title and interest in land, and the grantee expects to become vested with such estate, the deed, although it may not contain technical covenants of title, is binding on the grantor and those claiming under him, and they will be estopped to deny that the grantee became seized of the estate the deed purports to convey. *Taylor v. Shufford,* 11 N. C., 116, 129; *Cherry v. Cherry,* 179 N. C., 4; *Crawley v. Stearns,* 194 N. C., 15; *West v. Murphy,* 197 N. C., 488. Judgment Affirmed.

MRS. GEORGE H. READ v. M. A. TURNER AND MATHILDE S. TURNER, GUARDIAN.

(Filed 13 May, 1931.)

1. **Clerks of Court C b—Clerk of court has no power to order guardian of lunatic to pay debt contracted prior to adjudication of lunacy.**

The clerk of the Superior Court has only such powers as are conferred on him by statute, and his statutory powers to appoint a guardian for one who has been adjudged a lunatic, C. S., 2285, and the provision requiring such guardian to account to him in the administration of the estate, C. S., 2183-2188, and the power of the clerk to order the guardian to expend such sums as may be found by him necessary for the support of the lunatic and the members of his family dependent on him, does not give the clerk authority to order the guardian to pay debts of the lunatic contracted prior to the adjudication of lunacy.

2. **Courts A d—Superior Court has jurisdiction to order payment of debts of lunatic contracted before adjudication of lunacy.**

The Superior Courts in their equity jurisdiction have the power to order debts contracted by a lunatic before his adjudication of lunacy to be paid out of the funds in the hands of the guardian when there are funds available after provision has been made out of the estate for the maintenance of the lunatic and the dependents of his family.

3. **Insane Persons D b—Judgment creditors of insane person before adjudication are entitled only to prorate in funds available.**

Where a creditor has obtained judgment against his debtor before the latter's adjudication as a lunatic, and seeks by action in the Superior Court against the guardian to subject moneys available for the payment of such claims to the payment of his judgment, and the guardian makes it to appear that there are other like creditors of the lunatic, and that the funds are insufficient to pay all claims: *Held,* a refusal by the court of the guardian's motion to make other like creditors of the lunatic parties to the suit, is error and the case will be remanded, the judgment creditors being entitled only to prorate in the funds available unless there are priorities by liens or mortgages.

APPEAL by defendants from *Harding, J.,* at Chambers in the city of Charlotte, N. C., on 29 November, 1930. Error.

This is an action begun on 26 July, 1930, in the Superior Court of Mecklenburg County, for judgment and decree, ordering and directing the defendant, Mathilde S. Turner, guardian of M. A. Turner, a lunatic, to pay to plaintiff, out of money in her hands belonging to the estate of said lunatic, the amount due on a judgment recovered by the plaintiff of the defendant, M. A. Turner, prior to his adjudication as a lunatic.

Without objection, proceedings pending in said court, one begun by petition filed by the plaintiff herein in the action in which the judgment was recovered, and the other by petition filed by the plaintiff "In the matter of M. A. Turner, Lunatic, Mathilde S. Turner, Guardian," for the same relief as that sought herein, were consolidated with this action by order of Judge Harding, dated 29 November, 1930.

The facts alleged in the complaint in this action, and also in the petitions in said proceedings, are as follows:

1. On 21 February, 1927, in an action pending in the Superior Court of Mecklenburg County, entitled "Mrs. George H. Read *v.* M. A. Turner and M. E. Turner," judgment was rendered that plaintiff in said action recover of the defendants the sum of $3,000, with interest thereon from 11 November, 1926, and the costs of said action. This judgment is now duly docketed in the office of the clerk of the Superior Court of Mecklenburg County. No part of said judgment has been paid. The full amount thereof, with interest, is now due the plaintiff.

2. On 8 March, 1927, the said M. A. Turner was duly adjudged a lunatic by the clerk of the Superior Court of Mecklenburg County, and thereafter the defendant herein, Mathilde S. Turner, was appointed by said clerk as guardian of the said M. A. Turner. The said defendant has qualified as such guardian, and is now engaged in the performance of the duties of said guardianship. The said M. A. Turner is now insane and is confined in the State Hospital for the Insane at Morganton, N. C.

3. On 30 March, 1927, an order was made by the clerk of the Superior Court of Mecklenburg County, authorizing and directing the defendant, Mathilde S. Turner, guardian of M. A. Turner, to expend each month the sum of $400 for the support of the said lunatic and his family, the said sum to be paid out of the estate of the said lunatic, in the hands of his said guardian.

4. The said lunatic has a monthly income of $750, which is paid to his said guardian by an insurance company under the terms of its policy issued to him and in force at the date of his adjudication as a lunatic. After paying the sum of $400 monthly for the support of the said lunatic and his family, as she has been authorized and directed to do by the clerk of the Superior Court of Mecklenburg County, the defendant, Mathilde S. Turner, guardian, now has in hand a sum of money

in excess of $6,000, belonging to the estate of said lunatic. It is not necessary for the said guardian to hold or retain the said sum of money for the support of the lunatic and his family, but said sum of money is available for the payment of his debts contracted prior to his adjudication as a lunatic.

On these facts alleged in her complaint, plaintiff prays that a judgment and decree be entered in this action adjudging that she is entitled to have her judgment against M. A. Turner, lunatic, paid and discharged out of the money in the hands of the defendant, Mathilde S. Turner, guardian, ordering and directing the said guardian to pay to plaintiff out of said money the amount due on her judgment.

In her answers to the complaint in this action and to the petitions in said proceedings the defendant, Mathilde S. Turner, guardian of M. A. Turner, admits the facts to be as alleged therein, and says that she desires to disburse the money in her hands belonging to the estate of said lunatic as she may be directed to do by the court. In addition to the facts alleged in the said complaint and petition, she shows to the court:

"(a) That there are docketed in the Superior Court of Mecklenburg County ten judgments against the estate of M. A. Turner, a lunatic, a list of said judgments being attached hereto.

(b) That there are no other judgments against the estate of M. A. Turner.

(c) That all of said judgments are for indebtedness incurred by M. A. Turner prior to the date on which he was adjudged a lunatic; that there are no outstanding debts against the estate of M. A. Turner incurred since he was adjudged a lunatic.

(d) That as your respondent is informed and advised, the judgment in this cause has no priority or preference over the other judgments which have been recovered and docketed against the said M. A. Turner or said guardian; that all of said judgments have equal claim as to priority on said funds, and said funds if ordered disbursed on said judgments should be disbursed pro rata among the several judgments which have been docketed.

(e) That as your respondent is informed and believes, there are other indebtednesses claimed against her ward, M. A. Turner, by various persons or corporations; that none of said indebtedness has been reduced to judgment and no action has been brought on any such indebtedness; that so far as your respondent is advised, all of such claims or indebtedness would now probably be barred by the three-year statute of limitations; that more than three years have elapsed since the adjudication of insanity of M. A. Turner, and the appointment of your respondent as guardian of M. A. Turner, lunatic.

(f) That the funds in the hands of your respondent as guardian have been derived solely from health or disability insurance provisions in insurance policies; that it is necessary to pay the premiums on said policies in order to keep such policies in force; that loans were secured on certain insurance policies by M. A. Turner and your respondent is paying the interest on such loans; that some funds should be left in the hands of the respondent to be used for said purposes."

Attached to defendant's answer to the complaint in this action, and to her answers to the petitions in the proceedings which have been consolidated with this action, is a list of judgments docketed in the office of the clerk of the Superior Court of Mecklenburg County against M. A. Turner, or against Mathilde S. Turner, guardian of M. A. Turner, lunatic, aggregating in amount $66,129.72, showing the name of each judgment creditor, and the date and amount of each of said judgments.

After the order of consolidation had been made by Judge Harding, and when the action was called for hearing on the motion of plaintiff for judgment on the admissions in the pleadings, the defendant moved the court that all of the judgment creditors as shown on the list attached to her answers be made parties to this action, and be given leave to be heard before judgment was rendered. This motion was denied and defendant excepted.

It was thereupon considered, ordered and adjudged by the court that the defendant, Mathilde S. Turner, guardian, be and she was directed to pay off and discharge, out of the funds in her hands belonging to the estate of M. A. Turner, lunatic, the judgment of the plaintiff against the said M. A. Turner, in the sum of $3,000, with interest thereon from 11 November, 1926, and costs, together with the costs of this action, and of the proceedings consolidated herewith.

From this judgment defendant appealed to the Supreme Court.

Shore & Townsend for plaintiff.
Walter Clark for defendant.

CONNOR, J. If the judgment in this action from which the defendant has appealed is affirmed by this Court, the judgment for $3,000, with interest and costs, which the plaintiff recovered of M. A. Turner prior to his adjudication as a lunatic, will be paid in full out of his estate. The said estate, now in the hands of the defendant, as his guardian, and consisting of money, is not sufficient in amount for the like payment of the judgments of other creditors of the lunatic, whose debts were contracted also prior to the adjudication. The effect of the judgment in this action, therefore, is to give to plaintiff priority over other judgment creditors, who are not parties to this action and who had no opportunity to be heard before the judgment was rendered.

Power to appoint a guardian of a person who has been duly adjudged a lunatic (C. S., 2285), is conferred by statute in this State on the clerk of the Superior Court of the county in which such person resided or had his domicile at the date of his adjudication. C. S., 2150. Such guardian is required to give a bond or other security to be approved by a judge or by the court. C. S., 2161. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey the lawful orders of the clerk or judge touching the guardianship committed to him. C. S., 2162. In the administration of the estate in behalf of the lunatic, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by statute to account. C. S., 2183-2188. In proper cases it is the duty of the clerk to make an order authorizing and directing the guardian of a lunatic to expend from his estate such sum or sums as shall be found by the clerk are or may be required for the adequate support and maintenance of the lunatic and of the members of his family who are dependent on him. *Lemly v. Ellis,* 146 N. C., 221, 59 S. E., 683; *McLean v. Breese,* 109 N. C., 564, 13 S. E., 910; *McIlhenny v. Savings Co.,* 108 N. C., 311, 12 S. E., 1001; *Adams v. Thomas,* 83 N. C., 522, and 81 N. C., 296; *In re Latham,* 39 N. C., 231. Ordinarily, the guardian and the sureties on his bond are fully protected by the orders of the clerk, approved in proper cases by the judge, with respect to the administration of the estate of his ward.

It has been held by this Court that the clerk of the Superior Court is without power to authorize or order the guardian of a lunatic to pay out of the estate committed by the court to such guardian, debts of the lunatic contracted by him prior to his adjudication. In *Blake v. Respass,* 77 N. C., 196, it was said by *Bynum, J.:* "By the common law, as well as by statute 17 Edward II, ch. 10, which was only declaratory of the common law, the king as *parens patriæ* took charge of the effects of a lunatic, and held them, *first,* for the maintenance of him and his family, and *second,* for the benefit of his creditors, as the Court of Chancery might order from time to time." As the clerk of the Superior Court in this State has only such powers as are conferred on him by statute, and as no power has thus been conferred on the clerk to authorize or order the payment of the debts of a lunatic contracted prior to his adjudication, it follows that the clerk is without such power.

The proceedings begun by petition "In the matter of M. A. Turner, lunatic, Mathilde S. Turner, Guardian," and by petition in the action entitled, "Mrs. George H. Read *v.* M. A. Turner and M. E. Turner," in which the judgment for $3,000, with interest and costs, was rendered, should have been dismissed. The relief sought by the plaintiff on the facts alleged in the petitions in said proceedings can be had only in a civil action instituted by the plaintiff against the guardian of the lunatic, in the Superior Court of Mecklenburg County. This Court by virtue of its general equity jurisdiction has power to grant the relief. *Adams v. Thomas,* 83 N. C., 521.

The plaintiff has no lien by virtue of her judgment for $3,000 on the assets of the estate of M. A. Turner, in the hands of his guardian. She acquired no lien by the commencement of this action. The defendant, Mathilde S. Turner, guardian of M. A. Turner, lunatic, was well advised when she presented to the court, in her answer to the complaint, the facts shown therein, to wit, that there were judgment creditors of M. A. Turner, other than the plaintiff, whose judgments were recovered upon debts contracted by the lunatic prior to his adjudication and prior to her appointment as guardian. On all the facts appearing in the pleadings, these judgment creditors are entitled to share pro rata in the estate of the lunatic, after adequate provision has been made for the support and maintenance of the lunatic and his dependent family. There was error in the refusal of the court to make an order that these creditors be made parties to the action, before judgment was rendered. For this error the action is remanded to the Superior Court of Mecklenburg County for further proceedings in accordance with this opinion. Before any order is made or judgment rendered in this action, the court should find that provision has been made by an order of the clerk of the Superior Court of Mecklenburg County out of his estate for the adequate support and maintenance of the lunatic and of the members of his family who are dependent on him.

We quote with approval the language of *Dillard, J.,* in *Adams v. Thomas,* 81 N. C., 296, as follows:

"Property of a lunatic put into the hands of a committee is to be regarded as *in custodia legis,* and no creditor can reach it for a pre-existing debt, except through the order of the Superior Court, and that order is never made until first a sufficiency is ascertained and set apart for his own maintenance and that of his family, if minors, and this administration of the estate is based on the idea that the sovereign owes the duty to a person thus unfortunate to devote his property primarily to his maintenance and to protect him against his existing creditors, except in subordination thereto."

Where, however, adequate provision has been made for the support and maintenance of a lunatic and the dependent members of his family, out of his estate in the hands of his guardian, and there remains any part of said estate which is available for the payment of his creditors, such part of said estate should be disbursed by the guardian, under an order or judgment of the Superior Court, pro rata, among the creditors, where there are no priorities by virtue of liens or mortgages.

Error.

IN THE MATTER OF M. A. TURNER, LUNATIC, AND MATHILDE S. TURNER, GUARDIAN, EX PARTE.

(Filed 13 May, 1931.)

Insane Persons D b—Remedy of creditors of lunatic to subject estate to payment of debts contracted before adjudication is by civil action.

Where judgment creditors of a lunatic seek to subject the funds of the estate in the hands of the guardian to the payment of their debts contracted before the adjudication of lunacy, their remedy is by civil action in the Superior Court and not by petition, and a petition brought by them for this purpose is properly dismissed.

APPEAL by petitioners from *Cowper, Special Judge,* at March Term, 1931, of MECKLENBURG. Affirmed.

This is a proceeding begun by the petition of certain judgment creditors of M. A. Turner, a lunatic, on behalf of themselves and all other judgment creditors of the lunatic.

They pray that the court make an order that Mathilde S. Turner, guardian of the lunatic, disburse certain funds in her hands as such guardian, as payments pro rata on the judgments recovered of the lunatic and his guardian, on debts contracted by the lunatic prior to his adjudication.

From judgment dismissing the proceeding, without prejudice, the petitioners appealed to the Supreme Court.

F. A. McClenaghan and Thomas C. Guthrie for petitioners.
Shore & Townsend for Mrs. George H. Read, respondent.

CONNOR, J. There is no error in the judgment dismissing this proceeding. The relief sought by the petitioners on the facts alleged in their petition can be had only in a civil action begun and prosecuted in the Superior Court.

The petitioners and all other creditors of M. A. Turner, lunatic, should be made parties in the action entitled, "Mrs. George H. Read *v.* M. A. Turner *et al.,*" this day remanded to the Superior Court of Mecklenburg County for further proceedings in accordance with the opinion in *Read v. Turner, ante,* 773.

Affirmed.

SOUTHERN RAILWAY COMPANY v. GASTON COUNTY.

(Filed 13 May, 1931.)

1. **Taxation I b—Special statute relating to schedule of discounts and penalties in Gaston County held repealed by Machinery Act.**

The public-local statute relating to the schedule of discounts to be allowed and penalties to be enforced in the collection of taxes in Gaston County is held to be repealed by the Machinery Act passed thereafter at the same session of the Legislature providing for a schedule of discounts and penalties on all taxes levied by "any" county of the State, and where a taxpayer has paid the penalty imposed by the special act in an instance where the Machinery Act imposes no penalty, he is entitled to recover the amount so paid in his action therefor. Ch. 256, Public-Local Laws 1929; ch. 344, Public Laws 1929.

2. **Statutes C a—General act will not be construed to repeal special act unless provisions of general act exclude such construction.**

Where a general and special act are passed on the same subject, and the two are necessarily inconsistent, the special act will be construed as an exception to the general law unless the provisions of the general law necessarily exclude such construction, and in this case *Held:* the provisions of the Machinery Act of 1929 providing for a schedule of discounts and penalties on all taxes levied by "any county" of the State repeal a special act relating thereto, the word "any" as used by the Machinery Act being construed to mean "all."

APPEAL by defendant from *Harding, J.*, at January Term, 1931, of GASTON. Affirmed.

The judgment of the court below is as follows:

"It appearing from the pleadings that the facts are admitted and the right of the plaintiff to recover from the defendant the sum of $326.41, with interest thereon from 27 January, 1930, collected by the defendant as a penalty, in accordance with the provisions of chapter 256 of the Public-Local Laws of 1929, depends upon whether or not the aforesaid special act which was ratified on 11 March, 1929, was repealed by chapter 344 of the Public Laws of 1929, being the Machinery Act, ratified 19 March, 1929.

And it appearing that chapter 256 of the Public-Local Laws of 1929 provided for the taxpayers of Gaston County to be allowed a discount of two per cent on taxes paid in October, one per cent on taxes paid in November and taxes to be paid at par or face value in December and provided for a penalty of one per cent on taxes paid in January, two per cent on taxes paid in February, three per cent on taxes paid in March, and four per cent on taxes paid in April, special act to become effective from and after 30 September, 1929, whereas section 805 of the Machinery Act of 1929 is as follows:

"All taxes assessed and/or levied by any county in this State, in accordance with the provisions of this act, shall be due and payable on the first Monday of October of the year in which so assessed and levied, and if actually paid in cash.

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one per cent.

(2) After the first day of November and on or before the first day of December next after due and payable, there shall be deducted a discount of one-half of one per cent.

(3) After the first day of December, and on or before the first day of February next after due and payable, the tax shall be paid at par or face value.

(4) After the first day of February, and on or before the first day of March next after due and payable, there shall be added to the tax a penalty of one per cent.

(5) After the first day of March, and on or before the first day of April next after due and payable, there shall be added to the tax a penalty of two per cent.

(6) After the first of April, and on or before the first day of May next after due and payable, there shall be added a penalty of three per cent.

(7) After the first day of May, and on or before the first day of June next after due and payable, there shall be added a penalty of four per cent."

And it further appearing that section 810 of the Machinery Act provides that section 805 of this act, providing the schedule of discounts and penalties for payment of taxes shall apply for payment of taxes levied in one thousand nine hundred and twenty-nine and shall be in force and effect from and after October first, one thousand nine hundred and twenty-nine. It further appears that chapter 344 of the Public Laws of 1929 contains no repealing clause.

The court being of the opinion that the special act was repealed by chapter 344 of the Public Laws of 1929, and that section 805 of this act, providing the schedule of discounts and penalties for payment of taxes shall apply for payment of taxes levied in one thousand nine hundred and twenty-nine, and shall be in force and effect from and after October first, one thousand nine hundred and twenty-nine. It further appears that chapter 344 of the Public Laws of 1929 contains no repealing clause.

The court being of the opinion that the special act was repealed by chapter 344 of the Public Laws of 1929, and that section 805 of the

Machinery Act of 1929 provided only discounts and penalties that may be allowed, charged or collected by any county in this State for taxes levied for the year 1929:

It is therefore ordered, adjudged and decreed that the plaintiff have and recover of the defendant the sum of $326.41, with interest thereon from 27 January, 1930, and that the costs in this action be taxed against the defendant by the clerk as provided by law."

Mason & Mason and Hines, Kelly & Boren for plaintiff.
Emery B. Denny for defendant.

CLARKSON, J. The question involved: Did the court commit reversible error in holding that chapter 256 of the Public-Local Laws of 1929, which was ratified by the General Assembly of North Carolina on 11 March, 1929, was repealed by chapter 344 of the Public Laws of 1929, being the Machinery Act, ratified by the General Assembly on 19 March, 1929, and in signing judgment granting the relief prayed for by the plaintiff? We think not from the language of the Machinery Act.

This action was brought by plaintiff against defendant to recover $326.41. On 23 January, 1930, the Southern Railway Company tendered to J. W. Carroll, tax collector of Gaston County, the sum of $32,641.25 in payment of taxes assessed or levied against the plaintiff company, but he declined to accept the said sum in full payment and demanded payment of the further or additional sum of $326.41, said sum being a one per centum (1%) penalty on said taxes, which he contended was due and payable under and by virtue of the provisions of chapter 256 of the Public-Local Laws of 1929, which was ratified 11 March, 1929, because plaintiff had not paid or tendered such taxes on or before 1 January, 1930. The plaintiff paid the $326.41 under protest and brought this action. N. C. Code, 1927 (Michie), sec. 7880 (189).

The statute applicable to Gaston County imposes a penalty of one per cent (1%) for January, the Machinery Act did not, so the question is, as before stated, which act prevails?

The general principle of law on the subject is thus stated in *Kornegay v. Goldsboro,* 180 N. C., at p. 452: "Again, it is established that where a general and a special statute are passed on the same subject, and the two are necessarily inconsistent, it is the special statute that will prevail, this last being regarded usually in the nature of an exception to the former. *Cecil v. High Point,* 165 N. C., 431-435; *Commissioners v. Aldermen,* 158 N. C., 197-8; *Dahnke v. The People,* 168 Ill., 102; *Stockett v. Byrd,* 18 Md., 484, 'a position that obtains though the special law precedes the general, *unless the provisions of the general statute*

necessarily exclude such a construction. Rodgers v. U. S., 185 U. S., 83; Black on Interpretation of Laws, p. 117.' " (Italics ours.) *S. v. Davis,* 129 N. C., 570; *S. v. Cantwell,* 142 N. C., 604; *S. v. Johnson,* 170 N. C., 685; *Bank v. Loven,* 172 N. C., at p. 670; *Young v. Davis,* 182 N. C., at p. 203; *Felmet v. Commissioners,* 186 N. C., 251; *Blair v. Commissioners,* 187 N. C., 488; *Asheville v. Herbert,* 190 N. C., 736; *Greensboro v. Guilford,* 191 N. C., 584; *Monteith v. Commissioners,* 195 N. C., 75-6. See *S. v. Fowler,* 193 N. C., 290.

We think the provisions of the general statute, the Machinery Act, necessarily excludes the construction that the local statute was an exception. It expressly repeals the local statute. The language of the Machinery Act: "*All taxes* assessed and/or levied by *any county in this State,* in accordance with the provisions of this act, shall be due and payable on the first Monday of October, of the year in which so assessed and levied," and if actually paid in cash (3) "After the first day of December, and on or before the first day of February next after due and payable, the tax shall be paid *at par or face value.*"

In Bauldwin Century Edition of Bouvier's Law Dictionary (1929), the word "any" is defined: "It is synonymous with 'either,' 3 Wheel. Crim. Law Cas., 508; and is given the full force of 'every' or 'all,' 43 Mo., 254; 4 Q. B. D., 409; 91 U. S., 265. Frequently used in the sense of 'all' or 'every,' and when thus used it has a very comprehensive meaning. 2 A. & E. Ency. (2 ed.), 414. For example, it has been held that 'any' contract is sufficiently comprehensive to include special contracts as well as contracts which arise by implication. 91 U. S., 265."

"Federal court held to have jurisdiction of personal action by ship's carpenter, injured while repairing completed vessel in navigable waters of United States, without regard to his citizenship, since act 4 March, 1915, sec. 20, as amended by act 5 June, 1920, sec. 33 (46 U. S. C. A., sec. 688), giving 'any' seaman authority to sue at law, applies to 'every' seaman and requirement of Federal court's jurisdiction of such action is exclusive of that previously and generally imposed by Judicial Code, sec. 24 (28 U. S. C. A., sec. 41). *Kuhlman v. W. & A. Fletcher Co.* (C. C. A. N. J.), 20 F. (2d), 465, 468."

We think under the Machinery Act "any" means "all" or "every." For the reasons given the judgment of the court below is

Affirmed.

CLIFFORD MADRIN v. THE NORFOLK SOUTHERN RAILROAD COMPANY AND THE SINCLAIR REFINING COMPANY.

(Filed 13 May, 1931.)

1. **Trial D a—Upon motion of nonsuit all the evidence is to be considered in the light most favorable to the plaintiff.**

   Upon defendant's motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Railroads D b—Nonsuit as to defendant railroad company held error, as to codefendant affirmed—Obstructing view at crossings.**

   In an action to recover damages against two defendants, a railroad company and Sinclair Refining Company station, there was evidence tending to show that a highway crossed the defendant railroad company's tracks at a populous and much traveled place near where the codefendant, operating a station, had a yard into which there was a spur track of the railroad company with tank cars thereon which, with a pile of lumber and also advertising signs, obstructed the plaintiff's view of a train of the railroad company, fast approaching the crossing without giving warnings of any kind, so that the plaintiff, after having stopped his car, could neither see nor hear the approaching train until while attempting to cross the track the locomotive was upon him causing the injury in suit: *Held*, a demurrer upon the evidence should not prevail as to the defendant railroad company, but was good in favor of the defendant operator of the filling station. *Moseley v. R. R.*, 197 N. C., 628, cited and approved.

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1930, of PITT. *Affirmed* as to Sinclair Refining Company, *reversed* as to Norfolk Southern Railroad Company.

This is an action for actionable negligence instituted by plaintiff against the defendants, alleging damage. The defendants deny negligence and set up the plea of contributory negligence.

The Sinclair Refining Company, further answering, says: "That in the event the jury should find that the plaintiff's injuries were in any wise caused by the negligence of the defendants, which this answering defendant denies, then this answering defendant alleges and says: That the negligence of its codefendant, the Norfolk Southern Railroad Company, was the proximate cause of the plaintiff's said injuries. And if any judgment be had against this answering defendant on account thereof, then this answering defendant is entitled to have judgment over against its codefendant, the Norfolk Southern Railroad Company, for such amount."

The evidence was to the effect that the defendant, Norfolk Southern Railroad Company crosses the State Highway No. 11 on the outskirts of the corporate limits of the town of Greenville, and in a thickly settled mill village. The defendant Sinclair Refining Company owns and operates, or leases and operates, oil and gasoline tanks, a distributing station and buildings in the northeast corner or intersection of said railroad and Highway No. 11, and has been owning and operating the said station for two or three years. "There is a switch or spur track of the Norfolk Southern Railroad running out in the Sinclair Refining Company's yard. . . . The said station or building is about sixty feet from the railroad. The switch or spur track which runs out in the Sinclair yard at its nearest point to State Highway No. 11 is thirty-eight feet. . . . In approaching the crossing from the west there is a filling station in about one hundred feet of the crossing, on the north side of the highway. There are some stores next to said filling station and another filling station. It is a well traveled road. . . . The Norfolk Southern Railroad did not have gates there at that time to stop the traffic when trains were passing; they did not have or keep a guard there with a flag, to guard the traffic and travel. They did not have any gongs there to ring at that time."

The plaintiff testified, in part, that he was driving a Ford, model T, on 11 March, 1928, with his nephews in a car behind him, along Highway No. 11. "Just before I got to the Norfolk Southern crossing, I wanted to see if the boys were behind me, as I was showing them the proper way out of the highway. They were never here before. I stopped my car to see if they were behind me. They were. And I could not see to my right, for the first obstruction was this station. I drove by that, and the next obstruction was this lumber and signs and the oil tanks. I didn't see any train or could see no signs of any train. I could see to my left down to the factory; I could see everything clear, but when I put my car in gear and when I was on the track I could see the train flying. I couldn't do anything. I was practically right under it before I knew there was a train around. I looked westward, or tried to look westward down the railroad. When I drove to the crossing I couldn't see, and I had occasion to stop to see if those boys were behind me as they didn't know exactly the highway. I looked westward; I could not see down the railroad until I was in five feet of it, five or six feet before I could see to my right at all down the railroad, but when I started my car and got on the track the first thing I seen about the railroad engine was the drive-wheel flying very fast. It was on me; I realized that, and before I knew it I was on the track under the engine. The whistle did not blow for the crossing, the bell of the engine did not ring for the crossing. I did not hear the train at all; didn't know there was a train about me until about two seconds before it hit me. . . . The tank cars were over to my right when I was coming to this railroad crossing. They were to my right on this spur that runs into this filling station. There were two tank cars. They were setting on this spur that leads in from the main line to this filling station. . . . I can't say how far they were pushed out from the main line of the railroad. I had to get within five or six feet of this railroad crossing before I could see down the main line. . . . The pile of lumber was between the spur and the end of the shed. The pile of lumber was between the spur and the main line. . . . When I stopped and looked down the track looking for trains I was on my right-hand side going out. I stopped on my right-hand side going out. . . . Then the train struck me. I cannot say how far I went, but I was knocked over toward the little room that sits off here. It isn't a tool house; it may be a paint house. It was on the opposite side of the railroad. . . . I and the car fell. I think I was knocked between thirty and forty feet. . . . I was hurt about ten o'clock in the morning. At that time and prior to the time that I was hurt it was the heaviest traffic highway that come into Greenville by a whole lot. That crossing is in a country village. It is a cotton-mill settlement, and stores. . . . On the right-hand side going out, when you come to a filling station you will find stores and some people living along there on the right. . . . My right pelvis, I believe they call it, some have different names for it, but it is down in here, was spread or busted open. My pelvic bone was broken in two. This leg was broken in two (indicating left leg), and this knee cap was broken. It was my right knee cap that was broken. It was my left leg that was broken. This right knee cap was dislocated, turned around off the top and tore up—the ligaments all tore up; my cheek bone was busted in and the roof of my mouth was so split up so that my teeth came down below, and when I pushed them up it pushed my cheek bone in two. I had to hold it that way; this hand was broken; several cuts about the face and scalp. (Cross-examination, in part): I stopped from the crossing about as far as from here to that window (estimated at about 40 or 45 feet). . . . I said that when I drove to about fifty feet of the track the boys were trailing me, and I looked back to see if they were following me, and then I was fifty feet from the track. I absolutely came to a stop. I came to a standstill and looked back to see if the boys were behind me. . . . They stopped when I stopped. I am positive they were close behind me; they were at a position to stop and they had to stop or they would have run over me. From that conclusion I say they stopped. I say I stopped, and I say they stopped, and when I saw that they were back of me I started on. I did not see the train until I got on the track in five feet. I was trying to see down the track towards Farmville; kept watching all the time, but I was practically on the track when I saw the engine. I said I couldn't see down the track until I got on it, in five feet of it. I couldn't see down the track until I got within five feet of the track. . . . I can't say how close the western end of the car was to the northern iron of the main line; that spur runs so close I can't tell you. I can only tell how it blocked the view of the approaching train. That's the only thing I can tell you. I am positive there were two of those cars. . . . I did not hear the whistle. I did not hear the bell ring. I did not see any smoke and did not see any signs of the train at all until I was practically under it. . . . I said that I could not see the train on account of these two cars and the pile of lumber, and there was a sign right there in the view, and you see when I was driving up all of it obstructed the view. When you would pass one you would meet another one. I guess the pile of lumber was as high as your head. I guess I could see the train over the pile of lumber if there hadn't been anything but the lumber I possibly might have seen the train. The lumber had something to do with it; everything I passed was one obstruction right after another. I said I could have seen the train above the lumber. As to the sign I was talking about there was an angle I could have got in that would have hid the whole train. I was on the highway and the sign was in that fork. . . . I don't know whether the train was behind the sign or the tanks when I passed them. The sign was about as big as that curtain (about 6 by 12 feet). I would not swear that it was as big as that curtain, but it was high enough to hide the train. . . . I know that sign obstructed the view of the train, but I can't tell you how far it was. . . . There was so many of those things. I do know what kept me from seeing the train when I was close to the track and that was the tanks. I am positive that there were tanks on that track, without a reasonable doubt; yes, sir. I told you that I did not hear the train blow. I told you that I didn't hear the bell ring, and I am absolutely sure about it. I did not see a smoke and did not see the train coming, until I was right under it." The plaintiff was corroborated by numerous witnesses.

Julius Brown and Harding & Lee for plaintiff.
F. G. James & Son for Norfolk Southern Railroad Company.
Cooper & Whedbee for Sinclair Refining Company.

CLARKSON, J. At the close of plaintiff's evidence, the court below sustained motions of defendants for judgment as in case of nonsuit. C. S., 567. As to the Sinclair Refining Company, we can see no error; but as to the Norfolk Southern Railroad Company we think there was error.

As often repeated, it is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

On this appeal we do not think it necessary to pass upon the exceptions and assignments of error in regard to certain evidence introduced by plaintiff and excluded by the court below. On the present record we do not think there is sufficient evidence to be submitted to the jury as to actionable negligence on the part of Sinclair Refining Company. We think the evidence sufficient to be submitted to the jury as to the Norfolk Southern Railroad Company. We will not discuss the evidence, as the case goes back to be heard again. The principles of law governing this action have been thoroughly and fully considered in many recent decisions. *Moseley v. R. R.,* 197 N. C., 628; *Collett v. R. R.,* 198 N. C., 760; *Scoggins v. R. R.,* 199 N. C., 631; *Butner v. R. R.,* 199 N. C., 695; *Harris v. R. R.,* 199 N. C., 798; see *Eller v. R. R., ante,* 527.

The judgment of the court below as to the Sinclair Refining Company is *affirmed,* and as to the Norfolk Southern Railroad Company *reversed.*

SAMUEL W. WILSON v. UNION TRUST COMPANY OF MARYLAND AND INSURED MORTGAGE BOND CORPORATION OF NORTH CAROLINA, TRUSTEES, MORTGAGE SECURITY CORPORATION OF AMERICA, AND ALLISON W. HONEYCUTT AND HIS WIFE, MARY W. HONEYCUTT.

(Filed 13 May, 1931.)

Mortgages H b—Plaintiff held entitled to have order restraining foreclosure continued to hearing in order to ascertain amount of debt.

The holder of a second mortgage on lands brought action against the first mortgagee to restrain the foreclosure of the first mortgage. The court found as a fact that the second mortgagee was ready, able and willing to pay, upon assignment of the mortgage, the amount of the debt secured thereby, less interest, the second mortgagee alleging that usury had been charged thereon, C. S., 2306, the charge of usury was denied by the first mortgagee: *Held,* the second mortgagee was entitled to have the restraining order continued to the final hearing in order that the amount of the debt might be ascertained by the determination of the issue of usury.

APPEAL by defendants other than Allison W. Honeycutt and his wife, Mary W. Honeycutt, from *Schenck, J.,* at Chambers in Hendersonville, N. C., on 3 January, 1931. Affirmed.

This is an action to restrain the sale of land described in the complaint under the power of sale contained in a deed of trust executed by the defendants, Allison W. Honeycutt and his wife, Mary W. Honeycutt, to the defendants, Union Trust Company of Maryland and Insured Mortgage Bond Corporation of North Carolina, trustees, to secure their bonds for the sum of $6,000, negotiated to and now held by the defendant, Mortgage Security Corporation of America.

The plaintiff is the holder of a note executed by the defendants, Allison W. Honeycutt and his wife, Mary W. Honeycutt, and secured by a mortgage on the land described in the complaint. This mortgage was executed and recorded subsequent to the registration of the deed of trust, under which the land has been advertised for sale.

In his complaint plaintiff alleges that the amount now due on the principal of the bonds secured by the deed of trust, after applying all payments made thereon by the makers, is $2,568, and that he is ready, willing and able to pay said amount to the holder of said bonds, together with such sum as the defendants, other than Allison W. Honeycutt and his wife, Mary W. Honeycutt, have paid as taxes on the land described in the complaint, upon the assignment to him of said bonds and said deed of trust.

The plaintiff further alleges that the defendant, Mortgage Security Corporation of America, the holder of said bonds, has knowingly charged, reserved, taken and received interest on the principal of said bonds at a greater rate than six per centum per annum, and that, therefore, under the provisions of C. S., 2306, the entire interest on said bonds has been forfeited. This allegation is denied in the answer filed by the defendants other than Allison W. Honeycutt and his wife, Mary W. Honeycutt. These last named defendants have filed no answer.

The action was heard on the motion of the answering defendants that the temporary restraining order issued on the motion of the plaintiff be dissolved. This motion was denied.

From the order continuing the temporary restraining order to the final hearing, the answering defendants appealed to the Supreme Court.

Shipman & Arledge for plaintiff.
Johnson, Smathers & Rollins for defendants.

CONNOR, J. At the hearing of the motion of the answering defendants that the temporary restraining order issued in this action be dissolved, the judge found as a fact, from the admissions in the pleadings, that the aggregate amount of the monthly payments made by the defendants, Allison W. Honeycutt and his wife, Mary W. Honeycutt, on the bonds held by the defendant, Mortgage Security Corporation of America, and secured by the deed of trust to the defendants, Union Trust Company of Maryland, and Insured Mortgage Bond Corporation of North Carolina, trustee, is $3,432. The aggregate principal amount of these bonds was $6,000. There is no controversy, therefore, between plaintiff and the answering defendants, that the amount due on said principal is now $2,568.

The judge further found as a fact that the fair market value of the land described in the complaint is less than the amount which the answering defendants contend is due on the bonds secured by the deed of trust, plus the amount due the plaintiff on the note held by him and secured by the mortgage registered subsequent to the registration of the deed of trust.

The judge also found as a fact that the plaintiff is ready, willing and able to pay to the holder of the bonds secured in the deed of trust, which has priority over the mortgage by which his note is secured, the sum of $2,568, together with the sum paid by the defendants, other than Allison W. Honeycutt and his wife, Mary W. Honeycutt, as taxes and premiums for insurance, which sum is found to be $215.36, upon the assignment of said bonds and deed of trust to him.

The answering defendants contended at the hearing before the judge of the Superior Court, and contend on their appeal to this Court, that the amount due on the bonds secured by the deed of trust, which has priority over the mortgage by which the note held by the plaintiff is secured, is $6,000, the aggregate amount of said bonds, with interest at the rate of six per cent, less the aggregate sum of the monthly payments made on said bonds by the defendants, Allison W. Honeycutt and his wife, Mary W. Honeycutt, which sum, it is admitted by said defendants, is $3,432; and that notwithstanding the allegation in the complaint that the holder of said bonds has knowingly charged, reserved, taken and received interest on said bonds at a rate greater than six per cent, which allegation is denied by said defendants, the holder of said bonds has a prior lien on the land described in the complaint for the amount due thereon, enforceable against the plaintiff, in this action by which plaintiff seeks the equitable remedy of injunction. In support of this contention the said defendants cite and rely on *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334, in which it is said:

"It is the established law of this jurisdiction that when a debtor, who has given a mortgage to secure the payment of a loan, comes into equity, seeking to restrain a threatened foreclosure under the power of sale in his mortgage, as a deliverance from the exaction of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon paying or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest. *Corey v. Hooker,* 171 N. C., 229, 88 S. E., 236; *Owens v. Wright,* 161 N. C., 127, 76 S. E., 735. This ruling which has been established by an unbroken line of precedents, beginning with *Taylor v. Smith,* 9 N. C., 465, and running through a multitude of cases down to our latest decision in *Adams v. Bank,* 187 N. C., 343, 121 S. E., 529, is based upon the principle that he who seeks equity must do equity." *Waters v. Garris* has been cited and the principle on which the decision in that case rests applied in *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746, and in *Edwards v. Spence,* 197 N. C., 495, 149 S. E., 486.

Plaintiff in this action is not the debtor on the bonds secured in the deed of trust; he is a junior mortgagee. As such, he is under no obligation, legal or moral, to pay the amount due on the bonds. He has the right, enforceable in this action, to have the amount due on the bonds secured by the deed of trust which has priority over the mortgage by which his note is secured, ascertained, and definitely determined, and upon paying the amount so ascertained and definitely determined, to have the bonds and the deed of trust assigned to him. *Elliott v. Brady,* 172 N. C., 828, 90 S. E., 951. Until this amount, which is in controversy between plaintiff and the answering defendants, has been ascertained and definitely determined, plaintiff is entitled to have the sale of the land described in the complaint, under the power of sale contained in the deed of trust, enjoined and restrained. *Parker Co. v. Bank, ante,* 441, 157 S. E., 419.

The plaintiff contended at the hearing before the judge of the Superior Court, and as appellee in this Court contends, that the amount due on the bonds, for which the answering defendants have a lien on the land described in the complaint, by virtue of the deed of trust, is the principal of said bonds, to wit, $6,000, less the aggregate sum of the monthly payments made thereon by the debtors, to wit, $3,432, without interest. This amount, to wit, $2,568, the plaintiff is ready, willing and able to pay upon the assignment of the bonds and deed of trust to him. His contention is founded on the allegation in his complaint, which is denied in the answer of the defendants, that the holder of the bonds has exacted usury of the debtors thereon, and have thereby, under the provisions of C. S., 2306, forfeited the entire interest on the bonds. This contention is supported by our decision in *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576. In that case it was held that where the senior mortgage is affected with a charge of usury, the amount to be paid by the junior mortgagee, before requiring the assignment of the debt secured by the senior mortgage to him, is the principal sum due, without interest.

There is no error in the order continuing the temporary restraining order to the final hearing, when the issue raised by the pleadings, involving the execution of usury, may be submitted to and determined by a jury.

Affirmed.

W. H. BUCHANAN v. CAROLINA STORES, INC.

(Filed 13 May, 1931.)

Principal and Agent C b—Evidence of actual or apparent authority of agent held sufficient.

Evidence in this action to recover the price of goods sold and delivered is held sufficient to show that the purchaser's agent had actual or apparent authority to bind his principal in making the purchase.

APPEAL by defendant from *Stack, J.*, at July Term, 1930, of AVERY. No error.

This is an action to recover the contract price of beef sold and delivered by plaintiff to defendant.

From judgment on the verdict that plaintiff recover of defendant the sum of $450.10, and the costs of the action, defendant appealed to the Supreme Court.

J. W. Ragland for plaintiff.
Newland & Townsend and Burke & Burke for defendant.

PER CURIAM. There was evidence at the trial of this action tending to show that W. H. Tucker, who bought the beef from plaintiff, was at the time the general manager of defendant's store at Elk Park, N. C.; that he bought the beef and issued checks and a due bill for the purchase price as such general manager, and that the beef was bought by the said W. H. Tucker to be sold by the defendant at retail in its stores. The evidence was sufficient to show that W. H. Tucker had actual or at least apparent authority as general manager of defendant's store to buy the beef, and to pay for the same by the checks and due bill signed by him as general manager. *Bobbitt & Co. v. Land Co.,* 191 N. C., 323, 131 S. E., 643.

There was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. The judgment is affirmed.

No error.

JOHN C. ARBOGAST AND WIFE, IDA M. ARBOGAST, v. CORPORATION COMMISSION OF NORTH CAROLINA AS LIQUIDATING AGENT OF THE CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, ET AL.

(Filed 20 May, 1931.)

Estoppel C b—Bank retaining benefits held estopped to deny authority of president to make contract, and liquidating agent was bound thereby.

A bank having knowingly received and retained before its insolvency the adequate consideration of a contract made by its president in its behalf, is estopped to deny the authority of the president to bind it thereto, and where the contract obligates the bank to return certain notes upon which the plaintiff is either maker or endorser, and the consideration remains a part of the assets of the bank in the hands of the Corporation Commission or its successor, the Corporation Commission or its successor is also estopped to deny the terms of the contract and are bound thereby, and must return the notes in accordance therewith.

APPEAL by defendants from *McElroy, J.*, at April Term, 1931, of BUNCOMBE. Affirmed.

On and prior to 21 April, 1930, the Central Bank and Trust Company of Asheville, N. C., owned certain notes and bonds, on which the plaintiff, John C. Arbogast, was liable as maker or endorser. All these notes were past due. Some of the said notes were secured by deeds of trust on lands executed by the plaintiffs; others were secured by collaterals, and others were unsecured. The aggregate amount of said notes was $127,573.59.

It was agreed by and between Wallace B. Davis, president of the Central Bank and Trust Company, acting for and in behalf of said company and the plaintiff, John C. Arbogast, that the deeds of trust on the lands should be foreclosed, and that the Central Bank and Trust Company should acquire title to all the lands described therein, and that all of said notes, together with collateral held by the said company, should be delivered to the plaintiff, John C. Arbogast. The fair market value of said lands, at the date of this agreement, was $150,000.

Pursuant to said agreement, the said deeds of trust were foreclosed by sale under the powers of sale contained therein. The lands described in said deeds of trust have been conveyed to a corporation organized for the purpose of taking title thereto. This corporation holds the title to said lands in trust for the Central Bank and Trust Company. The notes and bonds held by the said Central Bank and Trust Company on which the plaintiff, John C. Arbogast was liable, have not been delivered to him, in accordance with the agreement.

On 19 November, 1930, the Central Bank and Trust Company, because of its insolvency, closed its doors and ceased to do business. Its affairs are now in the possession of the Corporation Commission of North Carolina, or its successor, the Commissioner of Banks, for the purpose of liquidation as provided by statute. The said Corporation Commission and its successor, the Commissioner of Banks, have refused to deliver the said notes and bonds, with collateral securing the same, all of which came into their possession as assets of the Central Bank and Trust Company, to the plaintiffs.

On the foregoing facts, it was ordered and adjudged that the defendants deliver to the plaintiffs all the notes and bonds, with collateral securing the same, described in the exhibit attached to the complaint, and that plaintiffs recover of the defendants the costs of the action.

From this judgment defendants appealed to the Supreme Court.

Anderson & Howell for plaintiffs.
Johnson, Smathers & Rollins for defendants.

PER CURIAM. By the contract made in its behalf by its president, Wallace B. Davis, with the plaintiff, John C. Arbogast, the Central Bank and Trust Company of Asheville, N. C., acquired property of the value of $150,000. The said company acquired said property, and retained the same with full knowledge of the agreement of its president that the notes and bonds held by it, aggregating in amount the sum of $127,573.59, with collateral securing the same, should be delivered by it to the plaintiffs.

The Central Bank and Trust Company, having ratified the contract, prior to its insolvency, was estopped from contending that its president was without authority to make the contract with the plaintiff on its behalf. The said company was bound by all the terms of the contract. See *Union Indemnity Company v. Perry,* 198 N. C., 286, 151 S. E., 629. The defendants are likewise bound by all of said terms, and are estopped from contending to the contrary. The judgment is

Affirmed.

MRS. LLOYD V. PARSONS, WIDOW OF LLOYD V. PARSONS, v. THE BOARD OF EDUCATION OF WATAUGA COUNTY ET AL.

(For digest see *Parsons v. Board of Education, ante,* 88.)

(Filed 19 December, 1930.)

APPEAL by respondent from *Finley, J.,* at August Term, 1930, of ASHE. Affirmed.

This was an appeal from the North Carolina Industrial Commission, heard on exceptions to the award made by said Commission in favor of claimant, the widow of Lloyd V. Parsons, deceased, and against the respondent, the Board of Education of Watauga County, and the United States Fidelity Company. The exceptions were overruled.

From judgment affirming the award respondents appealed to the Supreme Court.

W. R. Bauguess for claimant.

Trevelle & Holshouser for respondent.

Attorney-General Brummitt and Assistant Attorney-General Nash for Industrial Commission (by request).

PER CURIAM. The court being evenly divided in opinion, *Stacy, C. J.,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case, without becoming a precedent. *Gooch v. Western Union Telegraph Co.,* 196 N. C., 823, 146 S. E., 803, and cases cited. See, also, *Parsons v. Board of Education of Ashe County, ante,* 88.

Affirmed.

BEMIS LUMBER COMPANY v. G. H. COPE, DOING BUSINESS AS COPE LUMBER AND DIMENSION COMPANY.

(Filed 19 December, 1930.)

APPEAL by defendant from *Finley, J.,* at March Term, 1930, of GRAHAM. No error.

This is an action to recover the balance due for lumber sold and delivered by plaintiff to the defendant, G. H. Cope.

Defendant denies that he is liable for the amount due to the plaintiff. He alleges that the lumber was purchased by him as president of the G. H. Cope Lumber and Dimension Company, a corporation, and that said lumber was shipped by plaintiff to said corporation.

The issue submitted to the jury was answered as follows:

"In what sum, if any, is the defendant indebted to the plaintiff? Answer: $1,107.88."

From judgment on the verdict defendant appealed to the Supreme Court.

R. L. Phillips for plaintiff.
Moody & Moody for defendant.

PER CURIAM. There was evidence at the trial of this action tending to show that the defendant, G. H. Cope, purchased the lumber shipped by plaintiff to the G. H. Cope Lumber and Dimension Company, on his personal credit, and not on the credit of the corporation. This evidence, together with the evidence offered by the defendant tending to show the contrary, was submitted to the jury, under a charge which was free from error. As neither of defendant's assignments of error on his appeal to this Court can be sustained, the judgment must be affirmed.

No error.

CITY OF ELIZABETH CITY v. A. L. AYDLETT.

(Filed 19 December, 1930.)

APPEAL by plaintiff from *Cranmer, J.,* 23 April, 1930, at Columbia. From PASQUOTANK.

Civil action to restrain the defendant from interfering with the streets, sidewalks, shade trees, lamp posts, etc., around and near the site of defendant's gasoline filling or gasoline storage station, which he is seeking to erect in the corporate limits of Elizabeth City.

From a judgment sustaining the temporary restraining order as to a shade tree and a lamp post, but otherwise dissolving it, the plaintiff appeals.

J. B. Leigh and Thompson & Wilson for plaintiff.
M. B. Simpson and McMullan & LeRoy for defendant.

PER CURIAM. The disposition of this appeal is controlled by the decision in another case between the same parties involving the same filling station, *ante,* 58.

Error.

FARMERS FEDERATION, INC., v. W. S. LOCKMAN, JR., AND GRANT PHILLIPS.

(Filed 19 December, 1930.)

APPEAL by defendant Lockman from *Moore, J.,* at April-May Term, 1930, of HENDERSON. No error.

Joseph W. Little for appellant.

PER CURIAM. Plaintiff brought suit to recover $490.09 of the defendant Lockman for goods sold and delivered. Lockman admitted that he was due the plaintiff $352.80. The controversy between the plaintiff and Lockman was reduced to an issue of fact which was submitted to the jury under instructions free from error and answered in favor of the plaintiff.

We find no error in sustaining the demurrer of the defendant, Grant Phillips, to the answer of his codefendant.

No error.

SYLVESTER DUNLAP v. MRS. ROSE CARTER.

(Filed 27 January, 1931.)

CIVIL ACTION, before *Schenck, J.,* at July Term, 1930, of STOKES.

The plaintiff alleged and offered evidence tending to show that on the night of 26 October, 1928, while traveling along Academy Street in the town of Madison, he was injured by the negligence of defendant, who drove into said street from Wilson Street in a careless and negligent manner, without warning and without lights on her car. The defendant denied the allegations of negligence and offered evidence tending to show that the injury was the result of the negligence of plaintiff.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff.

From judgment upon the verdict the defendant appealed.

A. C. Bernard and W. Reade Johnson for plaintiff.
Folger & Folger for defendant.

PER CURIAM. In all essential aspects the record presents an issue of fact which was determined by the jury adversely to the defendant. The evidence was conflicting and the jury would have been fully warranted in finding for the defendant. This, however, they did not do. A close examination of all exceptions discloses to us no reversible error, and the judgment is affirmed.

No error.

ORANGE COUNTY v. DAISY JENKINS ET AL.

(Filed 27 January, 1931.)

APPEAL by C. P. Hinshaw from *Grady, J.* From ORANGE.

R. T. Giles for plaintiff.
J. R. Carawan for Hinshaw, respondent.

PER CURIAM. In view of the agreed facts and the admissions set out in the judgment, we are of opinion that the decision in *Orange County v. Andrew Jenkins et al., ante,* 202, is controlling in this case. Judgment Affirmed.

MRS. PATTIE WEST, TRADING AS O. B. WEST & COMPANY, v. W. B. COPPERSMITH ET AL.

(Filed 18 February, 1931.)

APPEAL by defendants from *Harris, J.,* at November Term, 1930, of PASQUOTANK.

Motion under C. S., 600, to set aside judgment by default and inquiry for excusable neglect. Motion denied. Defendants appeal.

McMullan & LeRoy for plaintiff.
Thompson & Wilson for defendants.

PER CURIAM. There is neither finding nor evidence on the record sufficient to establish that the neglect of the defendants was legally excusable. Hence, the ruling must be upheld on authority of *Sutherland v. McLean,* 199 N. C., 345, and *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906.

Affirmed.

AMERICAN AUTOMOBILE ASSOCIATION, INC., v. EDENTON-MACKEYS FERRY COMPANY, INC.

(Filed 18 February, 1931.)

APPEAL by plaintiff from *Harris, J.*, at December Term, 1930, of CHOWAN.

Civil action to recover on advertising contract.

From a directed verdict in favor of the defendant the plaintiff appeals, assigning errors.

W. D. Pruden for plaintiff.
Privott & Privott for defendant.

PER CURIAM. The theory of the court's instruction to the jury is that the plaintiff failed to show compliance with the terms of the contract on its part. The record discloses no reversible error.

No error.

A. F. McINTOSH v. F. R. SNIPES.

(Filed 4 March, 1931.)

APPEAL by plaintiff from *Devin, J.*, and a jury, at November Term, 1930, of LEE. No error.

This was an action for actionable negligence brought by plaintiff against defendant, alleging damages. The defendant denied that he was guilty of any negligence and set up the plea of contributory negligence, and in his answer, among other things, as a defense said: "That while the defendant was driving his automobile along and upon McIver Street in a western direction, and after he had crossed and passed beyond the intersection of First Street and Jenkins Street, and while he was some distance west of said streets, at a low and lawful rate of speed and in a careful manner, the plaintiff stepped from behind a truck where he was concealed and not visible to the defendant into the street directly in front of the automobile driven by the defendant at such time and in such way and manner and in such close proximity to said automobile that it was impossible for the defendant to stop his automobile and prevent the collision with the plaintiff and the resulting injury to him."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. Did plaintiff, by his negligence, contribute to his injury as alleged in the answer? Answer: Yes.

3. What damages is plaintiff entitled to recover therefor? (No answer.)."

Judgment was rendered for defendant on the verdict. Plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Williams & Williams and Hoyle & Hoyle for plaintiff.
A. A. F. Seawell and Gavin, Teague & Byerly for defendant.

PER CURIAM. On or about 11 November, 1929, defendant, who was driving a Hudson sedan automobile in the town of Sanford, ran into plaintiff, a pedestrian, when he started across McIver Street to his place of business in said town, and seriously injured him. The plaintiff in his brief set forth five questions presented, none of which we think can be sustained, as we see no prejudicial or reversible error on the record. The jury decided the disputed fact of contributory negligence for the defendant, and in law we find

No error.

STATE v. LEWIS DOYLE.

(Filed 4 March, 1931.)

APPEAL by defendant from *Cranmer, J.,* at January Term, 1931, of HALIFAX.

Criminal prosecution tried upon an indictment charging the defendant with carnal knowledge of a virtuous female child, over twelve and under sixteen years of age, contrary to the provisions of C. S., 4209.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison at hard labor for a term of four years.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
George C. Green for defendant.

PER CURIAM. Two errors are assigned by the defendant on his appeal to this Court, neither of which can be sustained. It would serve no useful purpose to set out the evidence or to discuss the exceptions.

The verdict and judgment will be upheld.

No error.

WILLIE LANGLEY v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 4 March, 1931.)

APPEAL by plaintiff from *Devin, J.,* at January Term, 1931, of PITT.

Civil action to recover on a contract of insurance.

From a judgment of nonsuit the plaintiff appeals, assigning errors.

P. R. Hines for plaintiff.
No counsel appearing for defendant.

PER CURIAM. It appears from plaintiff's own testimony that the policy in suit lapsed from the nonpayment of premiums long before the institution of the present action. The judgment of nonsuit is correct.

Affirmed.

ALLIE E. STANCILL v. J. HARVEY STANCILL.

(Filed 4 March, 1931.)

APPEAL by plaintiff from *Devin, J.,* at January Term, 1931, of PITT. No error.

Julius Brown for plaintiff.
John Hill Paylor and E. J. Wellons for defendant.

PER CURIAM. The plaintiff is the widow of Hubert D. Stancill, deceased; the defendant is his brother. The deceased has been a soldier in the army of the United States, and at the time of his death held an adjusted service certificate of insurance in the sum of $1,568, issued by the United States Government. The defendant was named as beneficiary. The plaintiff and the deceased were married on 14 April, 1930, and his death occurred in the latter part of the next month.

The plaintiff alleged that her husband had substituted her as the beneficiary in lieu of his brother by a letter addressed to the United States Veterans Bureau at Charlotte, and that she was entitled to the amount due on the certificate. Upon pleadings duly filed issues were framed, in response to which the jury found that the deceased had not written the letter or requested another to write it for him, and, in effect, that the beneficiary had not been changed.

We have examined the plaintiff's exception and find no error entitling the plaintiff to a new trial.

No error.

IN RE WILL OF W. T. YELVERTON.

(Filed 11 March, 1931.)

APPEAL by propounders from *Devin, J.,* at October Term, 1930, of WAYNE.

Devisavit vel non, tried upon the following issues:

"1. Were the paper-writings propounded as the last will and testament of W. T. Yelverton, and the codicil thereto, executed in the manner and form as prescribed by the statute for the execution of a valid last will and testament? Answer: Yes.

"2. At the time of the execution of the paper-writing propounded as his last will and testament dated 15 March, 1928, did said W. T. Yelverton have sufficient mental capacity to execute a valid will and testament? Answer: No.

"3. At the time of the execution of the paper-writing propounded as a codicil to his said last will and testament, dated 4 August, 1928, did the said W. T. Yelverton have sufficient mental capacity to execute a valid last will and testament? Answer: No."

From a judgment on the verdict the propounders appeal, assigning errors.

Dickinson & Freeman, Langston, Allen & Taylor and Finch & Rand for propounders.

Kenneth C. Royall, J. Faison Thomson and Teague & Dees for caveators.

PER CURIAM. This is the second appeal in a caveat proceeding, which has been tried twice in the Superior Court, with both trials lasting a number of days, and each resulting in a verdict for the caveators. *In re will of Yelverton,* 198 N. C., 746, 153 S. E., 319.

The second hearing, from which the present appeal is prosecuted, seems to have been conducted in substantial conformity to the decisions on the subject, and we apprehend that no serious harm has come to the propounders in any of the particulars pointed out by their exceptions and assignments of error. It would apparently serve no useful purpose to prolong the litigation either here or in the court below. The case presents no question of law not heretofore settled by authoritative decisions.

The verdict and judgment will be upheld.

No error.

ANNIE BELL DURHAM v. LUECO LLOYD, EXECUTOR OF CAROLINE LLOYD ET AL.

(Filed 11 March, 1931.)

APPEAL by defendant from *Harris, J.,* at May Term, 1930, of ORANGE. Affirmed.

This is an action to recover the reasonable value of services rendered by plaintiff to defendant's testatrix, as her companion, nurse and housekeeper, during the last five years of her life. In bar of plaintiff's recovery defendant relied chiefly on facts alleged in his answer as an estoppel.

From judgment on the verdict sustaining the contentions of plaintiff, defendant appealed to the Supreme Court.

McLendon & Hedrick and Long & Young for plaintiff.
H. A. Whitfield, A. E. Woltz and Gattis & Gattis for defendant.

PER CURIAM. The court being evenly divided in opinion as to the validity of defendant's assignments of error on his appeal from the judgment of the Superior Court, *Brogden, J.,* not sitting, the judgment is affirmed, in accordance with the practice in this Court. This decision disposes of the appeal, without becoming a precedent. *Parsons v. Board of Education, ante,* 88, 156 S. E., 244; *Gooch v. Western Union Telegraph Co.,* 196 N. C., 823, 146 S. E., 803, and cases cited.

Affirmed.

BROGDEN, J., not sitting.

GEORGE JOYNER v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 18 March, 1931.)

APPEAL by plaintiff from *Moore, Special Judge,* at February Term, 1931, of WAKE.

Civil action to recover on a contract of insurance.

The defendant pleaded fraud in the procurement of the policy, and, on evidence to support the finding, this issue was answered in favor of the defendant. Judgment entered accordingly.

Motion by plaintiff "to set aside the verdict as a matter of law"; overruled; exception; appeal.

George W. Ball for plaintiff.
Thos. W. Ruffin for defendant.

PER CURIAM. The record contains no exceptive assignment of error which can be sustained.

No error.

MONON STONE COMPANY v. DIXSON HOLDING CORPORATION.

(Filed 15 April, 1931.)

APPEAL by defendant from *Stack, J.,* at September Term, 1930, of FORSYTH.

The plaintiff furnished the defendant stone which was used in the construction of a building on a lot owned by the defendant in the city of Winston-Salem. Of the total cost, the plaintiff received $3,506.48, the balance claimed being $2,238.52.

The following verdict was returned:

1. Was the stone for the Brown-Rogers-Dixson Building on Trade Street furnished by the plaintiff, Monon Stone Company, and received by the defendant, Dixson Holding Corporation, as alleged in the complaint, said material being furnished upon a contract with the contractor or subcontractor who built the building on defendant's lot? Answer: Yes.

2. Did the plaintiff, Monon Stone Company, file a lien on the property of the defendant, Dixson Holding Corporation, for the stone furnished by it and used in the building constructed thereon within six months after the last of the said stone was furnished, as alleged in the complaint? Answer: Yes.

3. In what amount, if any, is the defendant Dixson Holding Corporation, indebted to the plaintiff for the stone furnished by the plaintiff? Answer: $2,238.52.

The facts in reference to the lien are set out in the judgment, which was rendered in favor of the plaintiff.

S. E. Hall and E. M. Whitman for plaintiff.
Parrish & Deal and Ingle & Rucker for defendant.

PER CURIAM. We are of opinion that this case was tried in substantial compliance with the law, and that the record discloses no reversible error.

No error.

SAMUEL ARROW v. H. C. CHANDGIE.

(Filed 15 April, 1931.)

APPEAL by plaintiff from *Finley, J.,* at January 5th Term, 1931, of GUILFORD.

Civil action brought before a justice of the peace to recover for personal services alleged to have been rendered by the plaintiff to the defendant, which resulted in a judgment for the plaintiff and appeal by the defendant to the Superior Court.

On a plea to the jurisdiction and denial of liability because plaintiff's claim allegedly arose out of unadjusted partnership dealings between the parties, the jury in the Superior Court found with the defendant.

From a judgment dismissing the action for want of jurisdiction, plaintiff appeals, assigning errors.

Younce & Younce for plaintiff.
Frazier & Frazier for defendant.

PER CURIAM. Affirmed on authority of *Nixon v. Morse,* 194 N. C., 225, 139 S. E., 170, *Love v. Rhyne,* 86 N. C., 576, and *Commissioners v. Sparks,* 179 N. C., 581, 103 S. E., 142.

Affirmed.

STATE v. DON ANDERSON.

(Filed 29 April, 1931.)

APPEAL by defendant from *Oglesby, J.,* at November Term, 1930, of MECKLENBURG.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

G. T. Carswell and Joe W. Ervin for defendant.

PER CURIAM. The defendant was indicted for violation of the prohibition laws. The State moved to dismiss the appeal for the reason that the record was not docketed within the required time. The motion is allowed. *S. v. Farmer,* 188 N. C., 243.

Dismissed.

O. H. ORR v. T. A. ENGLISH.

(Filed 13 May, 1931.)

APPEAL by plaintiff from *Harwood, Special Judge,* at December Term, 1930, of TRANSYLVANIA. No error.

Controversy for the recovery of land, in which upon pleadings filed, the following verdict was returned:

1. Was the name of Mrs. Gracie E. Jordan appearing on the paper-writing purporting to be a deed of trust, and introduced in evidence, a forgery as alleged in the complaint? Answer: No.

2. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: No.

3. Is the defendant in the wrongful possession of the land as alleged in the complaint? Answer: No.

Judgment for defendant, appeal by plaintiff upon error assigned.

Ralph H. Ramsey, Jr., for plaintiff.

Pat Kimzey for defendant.

PER CURIAM. This is an action to recover the possession of land, the parties claiming from a common source. The plaintiff claims title under a sheriff's deed made pursuant to an execution issued on a judgment in favor of the plaintiff and against Gracie E. Jordan and others, docketed in Transylvania County on 25 March, 1929. The defendant claims under a deed of trust executed by Gracie E. Jordan on 14 September, 1928, filed for registration 17 September, 1928, and a conveyance to himself from the trustee. The plaintiff admitted in open court that if the deed of trust, which constitutes a link in the defendant's chain of title, is not a forgery, then the defendant has the superior title of record. As appears from the verdict the issue relating to forgery was answered in favor of the defendant. This was the crucial point of controversy.

We have examined all the exceptions of the appellant, but find no error in the record which entitles the plaintiff to a new trial.

No error.

J. B. RITTER v. HIGH FALLS MANUFACTURING COMPANY.

(Filed 20 May, 1931.)

APPEAL by defendant from *McElroy, J.*, and a jury, at September Term, 1930, of MOORE. No error.

This is an action for actionable negligence brought by plaintiff against defendant alleging damage. The defendant denied negligence, set up the plea of contributory negligence and a release. Plaintiff contended the release was procured by fraud.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was said paper-writing, purporting to be a release, dated 25 September, 1926, procured by misrepresentation and fraud, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff, by his own negligence, contribute to his said injury, as alleged in the answer? Answer: No.

4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $900 in addition to what plaintiff has already received."

H. F. Seawell & Son and J. C. Renegar for plaintiff.
A. A. F. Seawell for defendant.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

We think the evidence sufficient to be submitted to the jury on the questions of negligence and contributory negligence. *Boswell v. Hosiery Mills,* 191 N. C., 549; *Mahaffey v. Furniture Lines,* 196 N. C., 810.

As to the evidence of fraud in procuring the release, we think it also sufficient to be submitted to the jury. *Butler v. Fertilizer Works,* 195 N. C., 409. In law we find

No error.

NORTH CAROLINA CORPORATION COMMISSION v. CENTRAL BANK AND TRUST COMPANY.

(Filed 20 May, 1931.)

CIVIL ACTION, before *Harris, J.,* at Chambers, WAKE Superior Court, 25 April, 1931.

The Central Bank and Trust Company of Raleigh was a banking corporation, and at the February Term, 1922, of the Superior Court of Wake County in an action entitled "Corporation Commission *v.* Central Bank and Trust Company," the said bank was closed, and J. C. Little, J. B. Ball and W. G. Barnes, duly appointed receivers thereof. The Chemical National Bank filed a claim with the receivers for the sum of $40,919. The Chemical National Bank held certain notes of the Central Bank and Trust Company as collateral security for said indebtedness. When the claim was filed the receivers took the position "that the Chemical National Bank was not entitled to receive a dividend upon its entire claim, but only a pro rata dividend on the amount of said claim less the value of the securities held by it." From the ruling of the receivers the Chemical National Bank appealed to the Superior Court. The trial judge decreed and ordered the receivers to pay to the Chemical National Bank "an amount of money which shall equal such percentage of $40,919 as has heretofore been paid to other creditors of Central Bank and Trust Company," etc.

From the foregoing judgment the receivers appealed.

Smith & Joyner for plaintiff, Chemical National Bank.
Murray Allen for receivers.

PER CURIAM. The judgment is affirmed upon authority of *Central Bank and Trust Co. v. Jarrett,* 195 N. C., 798. See, also, *Merrill v. Bank,* 173 U. S., 131.

Affirmed.

FRANK S. SMITH AND T. C. SMITH v. CORPORATION COMMISSION OF NORTH CAROLINA ET AL.

(Filed 20 May, 1931.)

APPEAL by defendants from *McElroy, J.*, at April Term, 1931, of BUNCOMBE. Affirmed.

Johnson, Smathers & Rollins for appellants.
Ward & Allen for appellees.

PER CURIAM. In January, 1926, Charles E. Outcalt executed a deed of trust on real property to Charles G. Lee, as trustee, to secure nine promissory notes aggregating $67,500. The plaintiffs held three of the notes in the respective sums of $5,000, $7,500, and $10,000. The trustee gave notice that the land would be sold under the deed of trust at 12 o'clock on 30 June, 1930, at the courthouse in Asheville; and at that hour he adjourned the sale until noon the next day. The sale was made at the time last mentioned and the highest bid was $500. The property was reasonably worth $10,000. The bidder assigned his bid to B. H. Arbogast, Inc., which was a subsidiary or holding company of the Central Bank and Trust Company, by whom it was controlled. The Central Bank and Trust Company is the owner of the other notes.

Upon the agreeed facts the General County Court adjudged the sale invalid and the judgment was affirmed by the Superior Court on appeal. This is a case in which the strict letter of the law, if favorable to the appellants, should yield to equities by which justice to all parties may be administered. Judgment

Affirmed.

M. M. FORTENBERRY v. HICKORY FLOUR AND FEED COMPANY, INC.

(Filed 20 May, 1931.)

APPEAL by plaintiff from *MacRae, Special Judge,* at February Special Term, 1931, of CATAWBA.

Civil action by plaintiff, an employee of the defendant, to recover damages for an alleged negligent injury caused by falling about nine feet down an elevator shaft.

According to plaintiff's testimony, the elevator which was used in moving hay and feed from one floor to another, was equipped with gates and bars, but these had been discarded by the employees. Plaintiff had used the elevator daily for five years, and was permitted to exercise his own judgment in doing his work. He was engaged in loading a truck with hay from the second floor of the building when he fell and was injured. He stepped over three or four bales of hay into the open shaft, without looking, as he mistakenly thought the elevator was there.

After being out three weeks, plaintiff returned to his job and continued working for the defendant for eleven months thereafter when he was dismissed and this suit was instituted.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

D. L. Russell and D. L. Russell, Jr., for plaintiff.
M. H. Yount for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that no error was committed by the trial court in nonsuiting the case. *Scott v. Tel. Co.*, 198 N. C., 795, 153 S. E.. 413.

Affirmed.

APPEAL FROM SUPREME COURT OF NORTH CAROLINA PASSED UPON IN SUPREME COURT OF THE UNITED STATES

State *ex rel.* Maxwell v. Hans Rees' Sons (199 N. C., 42).
Reversed.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND APPROVED SPRING TERM, 1931

(Annotated by W. P. Stacy and John A. Livingstone)

INDEX

(Numbers refer to Rules)

Appeal, abatement, and revivor, R. 37.
Appeal bond, R. 6 (1).
Appeal in criminal actions, R. 6.
Appeal dismissed for failure to prosecute, R. 15.
Appeal dismissed if not docketed in time, R. 17.
Appeal dismissed under Rule 17 not reinstated till costs paid, R. 18.
Appeal dismissed for failure to file brief, R. 28.
Appeal dismissed for failure to group exceptions, R. 19 (3).
Appeal dismissed for failure to mimeograph or print, R. 24, 28.
Appeal, motion to dismiss, when to be made, R. 16.
Appeal dismissed when frivolous, etc., R. 17 (1).
Appeals, two in one action, R. 19 (2).
Appeals, how docketed, R. 4.
Appeals *in forma pauperis*, R. 22.
Appeals, when heard, R. 5.
Agreements of counsel, R. 32.
Appearances, R. 33.
Applicants for law license, R. 1, 2, 3.
Arguments, R. 30, 31.
Arguments, printed submission, R. 10.
Briefs, appeal dismissed if not printed or mimeographed, R. 28.
Brief of appellant, when to be filed, R. 28.
Brief of appellant, copy to be furnished appellee, R. 28.
Brief of appellee, when to be filed, R. 29.
Brief not received after argument, R. 11.
Briefs regarded as personal appearance, R. 12.
Briefs, submission on, R. 10.
Briefs to be printed or mimeographed, R. 27.
Certification of decisions, R. 38.
Certiorari, R. 34 (1), (2), (3).
Citation of Reports, R. 46.
Clerk and commissioners, R. 40.
Costs of printing or mimeographing records and briefs, R. 25, 26.
Court's opinions to be copied and distributed, R. 42.
Court reconvened, when, R. 47.
Court, sittings of, R. 45.

Criminal actions, R. 6.
Death of party, when suggested, R. 37, par. 2.
Decisions, certification of, R. 38.
Districts, call of, R. 7.
Docket, call of, R. 9.
Docket, end of, R. 8.
Evidence to be in narrative form, R. 19 (4).
Examination of applicants for law license, R. 1, 2, 3.
Exceptions, R. 21.
Exceptions grouped, R. 19 (3).
Executions, R. 43.
Frivolous appeal dismissed, R. 17 (1).
Hearing case out of order, R. 13.
Hearing cases together, when, R. 14.
Issues, R. 35.
Judgment docket, R. 39.
Law license, R. 1, 2, 3.
Lawyers, nonresident, when licensed, R. 3.
Librarian, R. 41.
Mimeographing records and briefs, R. 25, 26.
Minute docket, R. 39.
Motions, R. 36.
Motion for certiorari, R. 34 (1), (2), (3).
Notice of certiorari, R. 34 (3).
Notice of intention to apply for license, R. 3(A).
Opinions of Court copied and distributed by clerk, R. 42.
Opinions of Court, when certified to Superior Court, R. 38.
Parties, death of, when suggested, R. 37, par. 2.
Pauper appeals, R. 22.
Petition for certiorari, R. 34 (1), (2), (3).
Petition to rehear, R. 44.
Pleadings, R. 20.
Pleadings, amendment to, R. 20 (4).
Pleadings, when deemed frivolous, R. 20 (1).
Pleadings, when containing more than one cause, R. 20 (2).
Pleadings, when scandalous, R. 20 (3).
Printing transcripts, R. 22, 23, 24, 25.
Prosecution bond, R. 19 (9).
Protests—when and how made, R. 3(B).
Reapplication for license, R. 3(C).
Rearguments, R. 31.
Rehearing, R. 44.
Reports of Supreme Court, how cited, R. 46.
Sittings of Court, R. 45.
Supreme Court Reports, how cited, R. 46.
Transcripts, what to contain and how arranged, R. 19.
Transcripts in pauper appeals, R. 22.
Transcripts, unnecessary portions, how taxed, R. 19 (5).
Transcripts printed or mimeographed, R. 22, 23, 24, 25.
Transcripts, when to be docketed, R. 5.

RULES

1. Applicants for License to Practice Law.

Applicants for license to practice law will be examined on the last Monday in January and Monday preceding the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. Course of Study Prescribed for Applicants for License to Practice Law.

Each applicant must have attained the age of 21 years, or will arrive at that age before the time for the next examination, and must have studied:

- Constitution of United States;
- Constitution of North Carolina;
- Creasy's English Constitution;
- Shepard's Constitutional Text-Book;
- Cooley's Principles of Constitutional Law;
- Blackstone's Commentaries, as contained in Vol. 1 of Ewell's Essentials of the Law;
- Bispham's Equity;
- Sharswood's Legal Ethics;
- Consolidated Statutes N. C. (Vol. 1).

Also some approved text-book on:

- Agency,
- Bailments,
- Carriers,
- Corporations,
- Contracts,
- Evidence,
- Executors,
- Negotiable Instruments,
- Partnership,
- Sales.

(1) *Requirements of Applicants for Law License.* Applicants must have studied the course prescribed for two years at least, and shall file with the clerk a certificate of good moral character signed by two members of the bar who are practicing attorneys of this Court, and also a certificate of the dean of a law school or a member of the bar of this Court, that the applicant has read law under his instructions, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence

of proficiency. An applicant from another State may file a certificate of good moral character signed by any State official of the State in which he resides. If the applicant had been licensed to practice law in another State, but is not entitled to be admitted in this State under Rule 3, based on the act of 1920, such applicant may file in lieu of the certificate of proficiency and time of study the law license which has been issued to him, with leave to withdraw the same after he has been examined. The foregoing certificates as to character and proficiency, and also $23.50, must be deposited with the clerk not later than Tuesday noon preceding the day of examination. The applicant in filing his certificates, which may be done personally or by mail, must give the clerk the applicant's full name and permanent postoffice address. If the applicant shall fail to entitle himself to receive a license, $22 of the money deposited by him (the $20 required by the statute and $2 price of parchment) shall be returned to him, but the $1.50 registration fee required by the statute shall be retained by the clerk.

See C. S., 194 and 196, and annotations thereunder.
UPRIGHT CHARACTER.—*In re* Application for License, 191—235, and 143—1.

3. Nonresident Lawyers—When Admitted.

Any person duly licensed to practice law in another state may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the state from which he comes, upon said applicant furnishing to the Supreme Court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signatures shall be attested by the clerk of said Court, and upon said applicant satisfying the Court that he is a bona fide resident and citizen of North Carolina, or intends immediately to become such: *Provided further,* that said applicant shall be required to deposit with the clerk of the Supreme Court the same amount required of applicants who stand the examination. (Ch. 44, Public Laws, Extra Session, 1920.) And such nonresident lawyer must comply with all preliminary requirements of application for license not later than noon of Tuesday preceding the day of examination.

ALIENS BARRED.—*Ex parte* Thompson, 10—359.

3. (A) Notice of Intention to Apply for License.

As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant on or before noon 15 December next immediately preceding the January examination if he wishes to apply for license at the January examination, and on or before noon 15 July next immediately preceding the August examination if he wishes to apply for license at the August examination. This notice must be in the clerk's office within the time specified, and mailing it in time to reach his office will not suffice unless actually received by him before the expiration of the time herein designated. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice law shall be open to inspection in the clerk's office from the time the notice is required to be given until Saturday noon preceding the day of examination. This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character.

3. (B) Protests—When and How Made.

Protest against the issuance of license in any case may be filed with the clerk on or before Saturday noon preceding the day of examination; and the applicant, so protested, shall be notified of such action immediately upon receipt of same, but the protest shall not be made public by the clerk unless and until said applicant shall have successfully passed the examination or met every other requirement necessary to the issuance of license. Any protested applicant may withdraw his application for license to practice law in this State at any time prior to tendering his paper for examination or his credentials for approval under the Comity Act, and, in which event, the protest will not be heard. But upon the tender of a satisfactory examination paper or satisfactory credentials under the Comity Act in the face of a protest, the matter then passes beyond the control of such applicant, and the Court will set a day for the hearing of said protest, first giving the protested applicant an opportunity to answer the charges preferred against him by issuing notices to all interested parties of the hearing.

BURDEN OF PROOF.—*In re* Application for License, 191—235; *In re Dillingham,* 188—162.

3. (C) Reapplication for License Not to Be Made in Two Years Following Denial for Want of Upright Character.

When an applicant has been denied license to practice law in this State on the ground of want of upright or good moral character as required by the statute, said applicant shall not be permitted to apply again for such license until two years have elapsed following the date of application which has been denied.

4. Appeals—How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

APPEALS STATUTORY AND ALLOWED ONLY FROM FINAL JUDGMENTS OR ORDERS AFFECTING SUBSTANTIAL RIGHTS.—*Caudle v. Morris,* 158—594; *Moore v. Hinnant,* 87—505; *Merrill v. Merrill,* 92—657; *Lutz v. Cline,* 89—186; *S. v. Keeter,* 80—472.

DISMISSED IF ONLY MOOT QUESTION PRESENTED.—*Rousseau v. Bullis,* 201—12; *Kistler v. R. R.,* 164—365.

5. Appeals—When Heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term fourteen days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed fourteen days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, Third and Fourth districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

See C. S., 629 *et seq.*, and annotations thereunder.

RULE SALUTARY AND MANDATORY.—*Pruitt v. Wood*, 199—788; *S. v. Harris*, 199—377; *Covington v. Hosiery Mills*, 195—478; *S. v. Surety Co.*, 192—52; *Stone v. Ledbetter*, 191—777; *Trust Co. v. Parks*, 191—263; *S. v. Farmer*, 188—243; *Walker v. Scott*, 102—487.

CANNOT BE ABROGATED BY AGREEMENT OR OTHERWISE.—*Pruitt v. Wood*, 199—788; *Covington v. Hosiery Mills*, 195—478; *Waller v. Dudley*, 193—354; *Finch v. Commissioners*, 190—154; *S. v. Farmer*, 188—243; *S. v. Butner*, 185—731; *Cooper v. Commissioners*, 184—615; *Rose v. Rocky Mount*, 184—609.

FAILURE TO DOCKET.—*Pentuff v. Park*, 195—609; *Stone v. Ledbetter*, 191—777; *S. v. Brown*, 183—789; *Mimms v. Seaboard*, 183—436; *S. v. Ward*, 180—693; *Carroll v. Mfg. Co.*, 180—660; *Caudle v. Morris*, 158—594; *Truelove v. Norris*, 152—755; *Hewitt v. Beck*, 152—757; *Mortgage Co. v. Long*, 116—77.

PRACTICE IN REGARD TO DOCKETING APPEALS SUMMARIZED.—*Porter v. R. R.*, 106—478.

DOCKETING REMOVES CASE FROM CONTROL OF PARTIES.—*Carswell v. Talley*, 192—37.

ABANDONMENT OF APPEAL.—*Pruitt v. Wood*, 199—788; *Jordan v. Simmons*, 175—537; *Avery v. Pritchard*, 93—266.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park*, 195—609.

6. Appeals—Criminal Actions.

Appeals in criminal cases, docketed fourteen days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Twentieth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

See C. S., 4647 *et seq.*, and annotations thereunder.

DOCKETING SAME AS CIVIL CASES.—*S. v. O'Kelly*, 88—609.

DISMISSED IF DEFENDANT FLEES OR IS "IN THE WOODS."—*S. v. Devane*, 166—281; *S. v. Keebler*, 145—560; *S. v. Jacobs*, 107—772.

NO APPEAL EXCEPT FROM FINAL JUDGMENT.—*S. v. Nash*, 97—514; *S. v. Hazel*, 95—623.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by section 647, Consolidated Statutes, the appeal will be dismissed.

FAILURE OF SURETY TO JUSTIFY.—*S. v. Wagner,* 91—521.

(2) *Pauper Appeals.* See Rule 22.

STATUTORY REQUIREMENTS COMPULSORY AND JURISDICTIONAL.—*S. v. Marion,* 200—715; *S. v. Smith,* 152—842.

DIFFERENT IN CIVIL AND CRIMINAL CASES.—C. S., 649 and 4651; *S. v. Gatewood,* 125—694.

IN CIVIL PAUPER CASES.—*Honeycutt v. Watkins,* 151—652.

(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed if Transcript Not Printed or Mimeographed.* See Rule 24.

MUST DOCKET RECORD.—*S. v. Farmer,* 188—243; *S. v. Johnson,* 183—730; *S. v. Trull,* 169—363.

7. Call of Judicial Districts.

Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.
From the Second District, the second week of the term.
From the Third and Fourth districts, the third week of the term.
From the Fifth District, the fourth week of the term.
From the Sixth District, the fifth week of the term.
From the Seventh District, the sixth week of the term.
From the Eighth and Ninth districts, the seventh week of the term.
From the Tenth District, the eighth week of the term.
From the Eleventh District, the ninth week of the term.
From the Twelfth District, the tenth week of the term.
From the Thirteenth District, the eleventh week of the term.
From the Fourteenth District, the twelfth week of the term.
From the Fifteenth and Sixteenth districts, the thirteenth week of the term.
From the Seventeenth and Eighteenth districts, the fourteenth week of the term.
From the Nineteenth District, the fifteenth week of the term.
From the twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the cases will be docketed in the order in which they are received by the clerk, but the cases in the later district in number will not be called before Wednesday of said week, but cases from the later district in number must nevertheless be docketed not later than fourteen days preceding the call for the week.

Carroll v. Mfg. Co., 180—660.

8. End of Docket.

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Twentieth District, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

NO DAILY CALENDAR.—*Pruitt v. Wood,* 199—788; *Lunsford v. Alexander,* 162—528.

10. Submission on Printed Arguments.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Nineteenth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(NOTE—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

NECESSITY OF BRIEF.—*Mills v. Guaranty Co.,* 136—255.

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

OPPOSITION TO CONTINUANCE.—*Dibbrell v. Ins. Co.,* 109—314.

13. When Case May be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

TITLE TO PUBLIC OFFICE.—*Caldwell v. Wilson,* 121—423.

14. When Cases May be Heard Together.

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed If Not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

RULE MANDATORY.—*Wiseman v. Commissioners,* 104—330.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park,* 195—609.

16. Motion to Dismiss Appeal—When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appllee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

DISMISSAL OF APPEAL.—*Pruitt v. Wood,* 199—788; *Martin v. Chambers,* 116—673; *Wiseman v. Commissioners,* 104—330.

BURDEN ON APPELLANT TO SHOW DILIGENCE.—*Simmons v. Andrews,* 106—201; *S. v. Goldston,* 201—89.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant in a civil action shall fail to bring up and file a transcript of the record fourteen days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: *Provided,* that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

(NOTE—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

LACHES OF APPELLANT.—*Brock v. Ellis,* 193—540; *Baker v. Hare,* 192—788; *Rogers v. Asheville,* 182—596; *Carroll v. Mfg. Co.,* 180—660; *Johnson v. Covington,* 178—658; *Cox v. Lumber Co.,* 177—227; *Murphy v. Electric Co.,* 174—782; *McNeill v. R. R.,* 173—730.

LACHES OF APPELLEES.—*Mitchell v. Melton,* 178—87; *McLean v. McDonald,* 175—418; *Gupton v. Sledge,* 161—214; *Barbee v. Green,* 91—158.

APPEAL DOCKETED BEFORE MOTION TO DISMISS.—*McLean v. McDonald,* 175—418; *Gupton v. Sledge,* 161—213.

FRIVOLOUS APPEALS DISMISSED.—*Ross v. Robinson,* 185—548; *Hotel Co. v. Griffin,* 182—539; *Blount v. Jones,* 175—708; *Ludwick v. Mining Co.,* 171—60.

FRAGMENTARY APPEALS.—*Headman v. Commissioners,* 177—261; *Yates v. Ins. Co.,* 176—401; *Martin v. Flippin,* 101—452; *Leak v. Covington,* 95—193.

PREMATURE APPEALS.—*Johnson v. Mills Co.,* 196—93.

APPELLANT NOT ENTITLED TO NOTICE.—*Kerr v. Drake,* 182—764; *Johnston v. Whitehead,* 109—207.

IF NO "CASE" FILED, APPEAL NOT DISMISSED, BUT JUDGMENT AFFIRMED.—*Smith v. Smith,* 199—463; *Roberts v. Bus Co.,* 198—779; *Wallace v. Salisbury,* 147—58; *Walker v. Scott,* 102—487.

APPELLEE MAY PROCEED IN SUPERIOR COURT.—*Pentuff v. Park,* 195—609.

18. Appeal Docketed and Dismissed Not to be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

As to costs on appeal, see C. S., 1, 256 *et seq.*, and also C. S., 646 *et seq.*

Pruitt v. Wood, 199—788.

19. Transcripts.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

See C. S., 643, 644 and 645.

IMPERFECT OR INCOMPLETE TRANSCRIPT.—*Waters v. Waters,* 199—667; *Schwarberg v. Howard,* 199—126; *S. v. McDraughon,* 168—131; *Hobbs v. Cashwell,* 158—597; *Cressler v. Asheville,* 138—482; *Sigman v. R. R.,* 135—181; *Wiley v. Mining Co.,* 117—489; *Jones v. Hoggard,* 107—349.

ORGANIZATION OF COURT MUST APPEAR ON TRANSCRIPT.—*S. v. May,* 118—1204.

ENTRY OF APPEAL MUST APPEAR ON RECORD.—*R. R. v. Brunswick County,* 198—549; *Mfg. Co. v. Simmons,* 97—89.

TRANSCRIPT MUST SHOW JURISDICTION AND BEFORE WHOM CASE TRIED.—*Spence v. Tapscott,* 92—576; *S. v. Butts,* 91—524.

FAILURE TO INDEX.—*Redding v. Dunn,* 185—311; *Kearnes v. Gray,* 173—717; *Sigman v. R. R.,* 135—181.

PURPOSE OF RULE.—*Waldo v. Wilson,* 177—461.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

WHEN TWO RECORDS UNNECESSARY.—*Pope v. Lumber Co.,* 162—208; *Hagaman v. Bernhardt,* 162—381; *Mills v. Guaranty Co.,* 136—255.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

APPEAL FROM JUDGMENT ONLY.—*Casualty Co. v. Green,* 200—535; *Owens v. Hines,* 178—325; *Hoke v. Whisnant,* 174—658; *Ullery v. Guthrie,* 148—418; *Wilson v. Lumber Co.,* 131—163.

ERROR ON FACE OF RECORD PROPER.—*Rogers v. Bank,* 108—574.

RULE MANDATORY.—*Thresher Co. v. Thomas,* 170—680; *Wheeler v. Cole,* 164—378; *Pegram v. Hester,* 152—765; *Davis v. Wall,* 142—450; *Hicks v. Kenan,* 139—337; *Sigman v. R. R.,* 135—181; *Brinkley v. Smith,* 130—224.

EXCEPTIONS MUST BE SPECIFIC.—*Rawls v. Lupton,* 193—428; *McKinnon v. Morrison,* 104—354.

HOW ASSIGNMENTS MADE.—*Cecil v. Lumber Co.,* 197—81; *Rawls v. Lupton,* 193—428; *Merritt v. R. R.,* 169—244; *Porter v. Lumber Co.,* 164—396; *Jones v. R. R.,* 153—420; *McDowell v. Kent,* 153—555; *Smith v. Mfg. Co.,* 151—261; *Thompson v. R. R.,* 147—413.

EXCEPTIVE ASSIGNMENTS OF ERROR, AND NONE OTHER, CONSIDERED.—*Rawls v. Lupton,* 193—428; *S. v. Freeze,* 170—710.

COURT WILL NOT MAKE VOYAGE OF DISCOVERY THROUGH RECORD.—*Cecil v. Lumber Co.,* 197—81.

DISMISSED FOR FAILURE TO FOLLOW RULE.—*Merritt v. Dick,* 169—244.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer,* 105—56.

(4) *Evidence to be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

STENOGRAPHERS' NOTES INSUFFICIENT.—*Casey v. R. R.,* 198—432; *Rogers v. Asheville,* 182—596; *Brewer v. Mfg. Co.,* 161—211; *Skipper v. Lumber Co.,* 158—322; *Bucken v. R. R.,* 157—443; *Cressler v. Asheville,* 138—483.

RULE MANDATORY.—*Pruitt v. Wood,* 199—788; *Carter v. Bryant,* 199—704; *Bank v. Fries,* 162—516.

PAUPER APPEALS.—*Skipper v. Lumber Co.,* 158—322.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Seven copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the

appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

FILING COPIES OF PLAT.—*Stephens v. McDonald,* 132—135.
PRINTING EXHIBITS.—*Hicks v. Royal,* 122—405; *Fleming v. McPhail,* 121—183.

(8) *Appeal Bond.* See Rule 6 (1).

See C. S., 646 *et seq.* and 1256 *et seq.*
Pruitt v. Wood, 199—788.

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Pruitt v. Wood, 199—788.

20. Pleadings.

(1) *When deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Plot v. Construction Co., 198—782.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

PROPER JOINDER MUST APPEAR ON FACE OF PLEADING OR FROM FACTS ALLEGED.—*Mfg. Co. v. Barrett,* 95—36; *Allen v. Jackson,* 86—321; *Sykes v. Grove,* 201—

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer

it to the clerk, or some member of the bar, to examine and report the character of the same.

SCANDALOUS, IMPERTINENT AND IRRELEVANT MATTER STRICKEN OUT.—*Hosiery Mill v. Hosiery Mill,* 198—596; *Ellis v. Ellis,* 198—767; *Mitchell v. Brown,* 88—156; *Powell v. Cobb,* 56—1.

(4) *Amendments.* The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

See C. S., 547 and 1414, and annotations thereunder.

AMENDMENT NOT ALLOWED TO GIVE LIFE TO A LIFELESS PROCEEDING.—*Hunt v. State,* 201—37.

21. Exceptions. (See, also, Rule 19 (3).

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

See C. S., 570 and 590, and annotations thereunder.

MUST BE CLEARLY STATED.—*Myrose v. Swain,* 172—223; *Rogers v. Jones,* 172—156; *Carter v. Reaves,* 167—131; *Spruce Co. v. Hunnicutt,* 166—202; *Thompson v. R. R.,* 147—412.

DUTY OF ATTORNEY.—*McLeod v. Gooch,* 162—122; *Allred v. Kirkman,* 160—392; *Worley v. Logging Co.,* 157—490.

JUDGE'S CHARGE.—*S. v. Jones,* 182—781; *Bank v. Pack,* 178—388.

RULE MANDATORY.—*In re Bailey,* 180—30; *Thresher Co. v. Thomas,* 170—680; *Hobbs v. Cashwell,* 158—597.

CORROBORATIVE AND CONTRADICTORY EVIDENCE.—*Singleton v. Roebuck,* 178—201; *Medlin v. Board of Education,* 167—239; *Cooper v. R. R.,* 163—150; *Crisco v. Yow,* 153—434; *Tise v. Thomasville,* 151—282; *Hill v. Bean,* 150—436; *Liles v. Lumber Co.,* 142—39; *Westfeldt v. Adams,* 135—591.

22. Printing Transcripts. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file seven typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, seven typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

NUMBER OF COPIES MANDATORY IN PAUPER APPEALS.—*Pruitt v. Wood,* 199—788; *Trust v. Miller,* 191—787; *Fisher v. Toxaway Co.,* 171—547; *Estes v. Rash,* 170—341.

23. How Printed.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this

Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

NECESSITY OF RULE.—*Lumber Co. v. Privette,* 179—1; *Howard v. Tel. Co.,* 170—495; *Barnes v. Crawford,* 119—127.

24. Appeal Dismissed if Transcript Not Printed or Mimeographed.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

RULE MANDATORY.—*Pruitt v. Wood,* 199—788; *S. v. Charles,* 161—286; *Truelove v. Norris,* 152—755; *Stroud v. Tel. Co.,* 133—253; *Dunn v. Underwood,* 116—525.

25. Mimeographed Records and Briefs.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, to carefully read the proof, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. Cost of Printing and Mimeographing Transcripts and Briefs to be Recovered.

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

See C. S., 1256.

EXCESSIVE COSTS.—*R. R. v. Privette,* 179—1; *Waldo v. Wilson,* 177—461; *Brown v. Harding,* 172—835; *Hardy v. Ins. Co.,* 167—569; *Overman v. Lanier,* 157—544; *Brazille v. Barytes Co.,* 157—454; *Yow v. Hamilton,* 136—357; *Roberts v. Lewald,* 108—405.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the Marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

MUST BE PRINTED OR MIMEOGRAPHED.—*Bradshaw v. Stansberry,* 164—356.

FAILURE TO FILE.—*Commissioners v. Dickson,* 190—330; *S. v. Dawkins,* 190—443.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

FAILURE TO COMPLY.—*Lumber Co. v. Latham,* 199—820; *Pruitt v. Wood,* 199—788.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Saturday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

FAILURE TO FILE IN TIME.—*In re Bailey,* 180—30; *Phillips v. Junior Order,* 175—133; *Rosamond v. McPherson,* 156—593.

EXCEPTIONS NOT BROUGHT FORWARD.—*In re Fuller,* 189—509; *S. v. Godette,* 188—497; *In re Westfeldt,* 188—702; *Byrd v. Southerland,* 186—384; *S. v. Bryson,* 173—803; *Campbell v. Sigmon,* 170—348; *Watkins v. Lawson,* 166—216; *S. v. Smith,* 164—475.

BRIEF LIMITED TO EXCEPTIVE ASSIGNMENTS OF ERROR.—*Coon v. R. R.,* 171—759; *Rawls v. Lupton,* 193—428.

EXCEPTIONS NOT DISCUSSED DEEMED ABANDONED.—*Gray v. Cartwright,* 174—49.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer,* 105—56.

PAUPER APPEALS.—*Covington v. Hosiery Mills,* 195—478; *Estes v. Rash,* 170—341.

"PASS BRIEFS" DISAPPROVED.—*Jones v. R. R.,* 164—392.

29. Appellee's Brief.

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

APPELLEE'S BRIEF DISMISSED.—*Phillips v. Junior Order,* 175—133.

30. Arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Rearguments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

> MAY ORDER REARGUMENT.—*Fleming v. R. R.,* 132—714; *Lenoir v. Mining Co.,* 104—490.

32. Agreements of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

> VERBAL AGREEMENTS INEFFECTUAL IF DENIED.—*Rogers v. Asheville,* 182—596; *McNeill v. R. R.,* 173—729; *S. v. Black,* 162—637; *Mirror Co. v. Casualty Co.,* 157—29; *Graham v. Edwards,* 114—229.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari.

(1) *When Applied For.* Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained

of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

See C. S., 630, and annotations thereunder.

WHEN APPLICATIONS SHOULD BE MADE.—*Pruitt v. Wood,* 199—788; *S. v. Harris,* 199—377; *S. v. Crowder,* 195—335; *Pentuff v. Park,* 195—609; *Baker v. Hare,* 192—788; *S. v. Ledbetter,* 191—777; *Finch v. Commissioners,* 190—154; *Hardy v. Heath,* 188—271; *S. v. Farmer,* 188—243; *S. v. Dalton,* 185—606; *S. v. Butner,* 185—731; *Cox v. Lumber Co.,* 177—227; *McNeill v. R. R.,* 173—729; *Todd v. Mackie,* 160—352.

WITHIN COURT'S DISCRETION.—*Pruitt v. Wood,* 199—788; *Womble v. Gin Co.,* 194—577; *Waller v. Dudley,* 193—354; *S. v. Surety Co.,* 192—52; *Trust Co. v. Parks,* 191—263; *S. v. Butner,* 185—731; *Mimms v. R. R.,* 183—436; *S. v. Johnson,* 183—731.

MUST DOCKET TRANSCRIPT.—*Brock v. Ellis,* 193—540; *Baker v. Hare,* 192—789; *Hardy v. Heath,* 188—271; *S. v. Farmer,* 188—243; *Motor Co. v. Reep,* 186—509; *S. v. Dalton,* 185—606; *S. v. Butner,* 185—731; *S. v. Johnson,* 183—730; *Lindley v. Knights of Honor,* 172—818; *Murphy v. Electric Co.,* 174—782; *Trans. Co. v. Lumber Co.,* 168—60; *Caudle v. Morris,* 158—594; *Critz v. Sparger,* 121—283.

35. Additional Issues.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ONLY WRITTEN MOTIONS CONSIDERED.—*McCoy v. Lassiter,* 94—131.

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. Certification of Decisions.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Con. Stats., sec. 1417. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

See C. S., 1413 and 1417.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk of such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Librarian.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year

next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. Executions.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

See C. S., 663 *et seq.*

44. Petition to Rehear.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

See C. S., 1419, and annotations thereunder.
RULE MANDATORY.—*Cooper v. Commissioners,* 184—615.
FILING AND DOCKETING.—*McGeorge v. Nicola,* 173—733; *Byrd v. Gilliam,* 123—63.
NOT ALLOWED AFTER TIME FOR FILING HAS EXPIRED.—*Cooper v. Commissioners,* 184—615.
NOT ALLOWED IN CRIMINAL CASES.—*S. v. Council,* 129—511.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

FAILURE TO FILE CERTIFICATES.—*Teeter v. Express Co.,* 172—620.

(3) *Two Copies to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there

have been two dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for

the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

See C. S., 1419, and annotations thereunder.

When Rehearing Allowed.—*Battle v. Mercer,* 188—116; *S. v. Martin,* 188—119; *Greene v. Lyles,* 187—598; *Weston v. Lumber Co.,* 168—98; *Weisel v. Cobb,* 122—67; *Mullen v. Canal Co.,* 115—16; *Haywood v. Davis,* 81—8.

Not Allowed in Criminal Cases.—*S. v. Council,* 129—511; *S. v. Jones,* 69—16.

Rehearing Matter of Discretion.—*Moore v. Harkins,* 179—525.

Rehearing by Means of Second Appeal Not Allowed.—*Strunks v. R. R.,* 188—567; *Ray v. Veneer Co.,* 188—414; *R. R. v. Story,* 187—184; *LaRoque v. Kennedy,* 161—459; *Hospital v. R. R.,* 157—460.

New Trial for Newly Discovered Evidence in Civil Cases.—*Moore v. Todwell,* 194—186; *Smith v. Moore,* 150—158; *Black v. Black,* 111—301.

Requirements Stated.—*Johnson v. R. R.,* 163—431.

Motion in Superior Court After Affirmance on Appeal.—*Allen v. Gooding,* 174—271.

Newly Discovered Evidence Not Considered in Criminal Cases.—*S. v. Griffin,* 190—133; *S. v. Lilliston,* 141—857.

45. Sittings of the Court.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law. (But see Rule 1.)

46. Citation of Reports.

Inasmuch as all the volumes of Reports prior to the 63rd have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	“	2	“
2 “	“	3	“
1 and 2 Car. Law Repository & N.C. Term	“	4	“
1 Murphey	“	5	“
2 “	“	6	“
3 “	“	7	“
1 Hawks	“	8	“
2 “	“	9	“
3 “	“	10	“
4 “	“	11	“
1 Devereux Law	“	12	“
2 “ “	“	13	“
3 “ “	“	14	“
4 “ “	“	15	“
1 “ Eq.	“	16	“
2 “ “	“	17	“
1 Dev. & Bat. Law	“	18	“
2 “ “	“	19	“
3 & 4 “ “	“	20	“
1 Dev. & Bat. Eq.	“	21	“
2 “ “	“	22	“
1 Iredell Law	“	23	“
2 “ “	“	24	“
3 “ “	“	25	“
4 “ “	“	26	“
5 “ “	“	27	“
6 “ “	“	28	“
7 “ “	“	29	“
8 “ “	“	30	“
9 Iredell Law	as	31	N. C.
10 “ “	“	32	“
11 “ “	“	33	“
12 “ “	“	34	“
13 “ “	“	35	“
1 “ Eq.	“	36	“
2 “ “	“	37	“
3 “ “	“	38	“
4 “ “	“	39	“
5 “ “	“	40	“
6 “ “	“	41	“
7 “ “	“	42	“
8 “ “	“	43	“
Busbee Law	“	44	“
“ Eq.	“	45	“
1 Jones Law	“	46	“
2 “ “	“	47	“
3 “ “	“	48	“
4 “ “	“	49	“
5 “ “	“	50	“
6 “ “	“	51	“
7 “ “	“	52	“
8 “ “	“	53	“
1 “ Eq.	“	54	“
2 “ “	“	55	“
3 “ “	“	56	“
4 “ “	“	57	“
5 “ “	“	58	“
6 “ “	“	59	“
1 and 2 Winston	“	60	“
Phillips Law	“	61	“
“ Equity	“	62	“

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e., the original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

47. Court Reconvened.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

REVISED AND ADOPTED BY THE JUSTICES OF THE SUPREME COURT

RULES

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of Witnesses.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

In re Will of Brown, 194—583; *In re Peterson,* 136—13; *Cheek v. Watson,* 90—302.

7. Issues.

Issues shall be made up as provided and directed in the Con. Stats., sec. 584.

8. Judgments.

Judgments shall be docketed as provided and directed in Con. Stats., sec. 613 and 614.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit of attachment	4

and so on to the end.

12. Transcript on Appeal—When Sent Up.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Con. Stats., sec. 645.

13. Reports of Clerks and Commissioners.

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by the Revisal, sec. 584. In such case the writ shall be made returnable to the term of the Superior Court, of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to be Filed.

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardians Ad Litem—How Appointed.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases Put at Foot of Docket.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion is Certified.

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Con. Stats., sec. 4656.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar Under Control of Court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from Justices of the Peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On Consent Continuance—Judgment for Costs.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel Not Sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. Books.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

STATUTES RELATING TO RULES OF COURT

C. S., 1421. *Power to make rules of Court.* The Justices of the Supreme Court shall prescribe and establish from time to time rules of practice for that Court, and also for the Superior Courts. The clerk shall certify to the judges of the Superior Court the rules of practice for such court, to be entered on the records thereof in each county.

(In Calvert v. Carstarphen, 133 N. C., 25, Clark, C. J., delivering the opinion of the Court, it was said: "The rules of the Supreme Court are mandatory, not directory. Walker v. Scott, 102 N. C., 487; Wiseman v. Commissioners, 104 N. C., 330; Edwards v. Henderson, 109 N. C., 83. As the Constitution, Art. I, sec. 8, provides that 'The legislative, executive, and **Supreme Judicial Powers** of the Government ought to be forever separate and distinct from each other,' the General Assembly can enact no rules of practice and procedure for this Court, which are prescribed solely by our Rules of Court. Herndon v. Ins. Co., 111 N. C., 384; 18 L. R. A., 547; Horton v. Green, 104 N. C., 400; Rencher v. Anderson, 93 N. C., 105. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12 (S. v. Edwards, 110 N. C., 511), except that, as to such lower courts, when the Legislature fails to provide the practice and procedure in any particular, this Court can do so. The Code, sec. 961; Barnes v. Easton, 98 N. C., 116; Cheek v. Watson, 90 N. C., 302.")

See, also, S. v. Crowder, 195-335; Womble v. Gin Co., 194-577; Cooper v. Comrs, 184-615; Cox v. Lbr. Co., 177-227; Phillips v. Jr. Order, 175-133; S. v. Goodlake, 166-434; Porter v. Lbr. Co., 164-396.

C. S., 1421(a). *Supreme Court to prescribe rules. Rules to conform to law.* The Supreme Court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the Superior Court, and before referees: *Provided,* no rule or regulation so adopted shall be in conflict with this law or any of the provisions of the Consolidated Statutes of 1919. Such rules as may be adopted by the Supreme Court shall be printed and distributed by the Secretary of State as are the Reports of the Supreme Court.

INDEX.

ABATEMENT AND REVIVAL—Contracts surviving death see Executors and Administrators C b; pendency of another action may not be taken by demurrer see Pleadings D c 1.

"ACT OF GOD" see Negligence A f.

ACTIONS (Laws of which state govern transitory action brought here see States A a; consolidation of actions see Criminal Law I f; misjoinder of parties and causes see Pleadings D b; submission of controversy without, see Controversy Without Action.)

B Forms of Action for Enforcement of Particular Rights or for Redress of Particular Wrongs.

b Title or Right to Public Office or Position

1. Where a statute creating a county highway commission authorizes such commission to employ a superintendent of roads and such subordinates as may be necessary, and thereinafter refers to such superintendent and subordinates as "agents or employees": *Held*, the superintendent is an agent of the county and not an officer thereof, it appearing that the Legislature so contemplated him, and it is not necessary that the right of one claiming such office by appointment be tested by proceedings in the nature of a *quo warranto*, but injunctive proceedings will lie to enjoin him from exercising the authority of superintendent. *Surry County v. Sparger*, 400.

c Malicious Prosecution and False Imprisonment

1. An affidavit charging the prisoner with having stolen goods in his possession "which plaintiff is fully satisfied was stolen" is not sufficient to make out a charge of receiving stolen goods knowing them to have been stolen, or of any legal offense, and a warrant issued thereon will be construed therewith, and such warrant is void, and the plaintiff's remedy is for false imprisonment and not malicious prosecution. *Young v. Hardwood Co.*, 310.

d Injuries to the Person

1. Where an action for damages is founded upon the erection of defendant's building over his property line upon the sidewalk of a city street rendering the use of the sidewalk dangerous to pedestrians taken in connection with a projecting water pipe partly over the sidewalk, the gravamen of the action is to recover damages arising from a nuisance created by the defendant and not exclusively involving the negligence of the defendant. *Swinson v. Realty Co.*, 276.

ADMISSIONS see Criminal Law G f.

ADVERSE POSSESSION.

A Nature and Requisite of Titles by Adverse Possession.

h Color of Title

1. Where the wife for a monetary consideration has attempted to convey her estate by entirety to her husband, observing all the statutory requirements concerning a wife's conveyance to her husband, and thereafter an absolute divorce has been decreed, the wife's deed to

ADVERSE POSSESSION A h—*Continued.*

her husband is color of title even if it be void, and his sufficient adverse possession for seven years, C. S., 428, will ripen the fee-simple title in him, and upon conflicting evidence a question is raised for the determination of the jury as to the length and character of the possession. C. S., 997, 2515, 3324. *Potts v. Payne,* 246.

i Of Streets or Other Public Places

1. Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of C. S., 430, by twenty years adverse possession. *Gault v. Lake Waccamaw,* 593.

2. The principle of law that the statute of limitations will not run against a muncipality as to its street by encroachment thereon or adverse possession by its citizens applies only to such streets as the muncipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn, and where thereafter the municipality attempts to assert its right, its claim may become a cloud upon the title of the offerer or his grantee, entitling him or them to the equitable remedy of injunction against the assertion by the municipality of such claim of right. C. S., 435. *Ibid.*

3. In order for a municipality to establish the right to maintain a street on privately owned lands where an original grant from the owner has not been shown, it must show its exclusive and adverse use and control thereof for that purpose for a period of twenty years in order for an original grant by the owner or a dedication by him to be presumed, and although such adverse use may be inferred from the occupation itself when sufficient to permit the inference that the public had assumed control and was using the land adversely and as a matter of right, in this case evidence of such adverse user is held insufficient to be submitted to the jury, and a directed verdict in the owner's favor was not error. *Wright v. Lake Waccamaw,* 616.

AGRICULTURE—Right of purchaser at foreclosure sale to agricultural lien see Mortgages H m 1, 2.

APPEAL AND ERROR (In criminal cases see Criminal Law L; appellate jurisdiction of Superior Courts see Courts A c; recordari see Justices of the Peace E b).

A Nature and Grounds of Appellate Jurisdiction of Supreme Court. (In *habeas corpus* proceedings see *Habeas Corpus* D.)

d Final Judgment and Premature Appeals

1. Where a motion to strike out certain matters in the pleadings is addressed to the court as a matter of right and not as a matter of discretion, an order granting the motion is reviewable on appeal. *Bank v. Atmore,* 437.

APPEAL AND ERROR A—*Continued.*

e Moot Questions

1. The courts will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Goldsboro v. Supply Co.*, 405.

2. Where on appeal from an award of the Industrial Commission to the dependents of an employee of a county highway commission there is nothing in the record showing that the board of commissioners of the county has attempted to levy a tax, contract a debt, pledge its faith, or loan its credit in breach of Article VII, section 7, of the Constitution, an objection to the award on the ground that the Workmen's Compensation Act is in conflict with the provisions of Article VII, section 7, presents an academic question, and one which should be considered only upon a full disclosure of all facts in a proceeding to which the board is made a party and given an opportunity to be heard. *Hagler v. Highway Commission*, 733.

E Record.

a Necessary Parts of Record Proper

1. Case dismissed on appeal for failure to observe Rule 19(1) governing appeals, the nature of the action not appearing from the record. *Gardner v. Moose*, 88.

2. A case submitted on agreed statement of facts must be accompanied by necessary affidavit, and if an adversary proceeding the record proper must contain necessary parts, otherwise the appeal will be dismissed. *Garris v. Hardy*, 91; *Lipe v. Stanly County*, 92.

h Questions Presented for Review

1. Ordinarily on appeal from an order setting aside a verdict the appellant must show error, but in this case the parties assume that the verdict was set aside for insufficient evidence, and the Supreme Court acts thereon. *Godfrey v. Coach Co.*, 41.

2. In an action to restrain the foreclosure of a mortgage on lands wherein, on the trial, it is admitted that the issue as to the amount of plaintiff's indebtedness should be answered in a certain amount, the question as to whether the plaintiff is entitled to a credit on the note for usurious charges becomes academic, and will not be decided on appeal. *Green v. Gladstone*, 347.

3. In this case held: the record containing no statement of case on appeal, the Supreme Court is limited to the question of whether there was error in the judgment, the appeal being an exception thereto. *Parker Co. v. Bank*, 441; *Casualty Co. v. Green*, 535.

4. Where neither party makes objection to the issue submitted, the Supreme Court on appeal will interpret the record in the light of the theory prevailing in the trial court. *Edgerton v. Perkins*, 650.

F Exceptions and Assignments of Error and Procedure in Lower Court Necessary to Right to Review.

a Necessity for Exceptions and Assignments of Error

1. Where an appeal in a civil action is taken from the judgment of a county court to the Superior Court, which affirms the judgment

APPEAL AND ERROR F a—*Continued.*

appealed from, on further appeal to the Supreme Court without specific exceptions and assignments of error required by Rule 19 (3) to the proceedings in the Superior Court based on exceptions duly taken and presented in the county court, only matters of law or legal inference will be considered in the Supreme Court, and where the only exception is to the judgment and error does not appear therein, the judgment will be affirmed; and ordinarily when assignments of error are not duly taken and made to appear of record in the Supreme Court, the appeal, on motion, will be dismissed. C. S., 1608(cc). *Smith v. Texas Co.*, 39.

2. Matter discussed in appellant's brief must be presented by assignment of error to be considered on appeal. *Clark v. Henderson*, 86.

b Form and Requisites of Exceptions

1. In order for a charge of the court to the jury to be considered on appeal the appellant's exception must be specific in pointing out the supposed error and not merely a "broadside" exception, as in this case "defendant excepts to the charge of the court." *Roberts v. Davis*, 424.

d Appeal, Notice and Entry

1. Upon defendant's appeal from an order of the trial court striking out irrelevant and immaterial matters from the pleadings, another order in which a party to the action is made, excepted to but not appealed from, will not be considered. *Bank v. Atmore*, 437.

2. Where a nonresident defendant has been personally served with summons under the provisions of C. S., 491, and afterwards assigned all his rights and interests in the action, he is not a real party in interest in an appeal taken by his assignee in his name, and where the latter has taken no appeal his rights will not be determined therein. *Casualty Co. v. Green*, 535.

J Review (Of *habeas corpus* proceedings see *Habeas Corpus*).

b Discretion of Court

1. The refusal of the trial court to allow a defendant to file answer after the time is not reviewable on appeal, the matter being within the sound discretion of the trial court. *Washington v. Hodges*, 364.

2. The action of the trial judge in making necessary parties to an action is reviewable on appeal, and the making of proper parties is addressed to his sound discretion and not reviewable. C. S., 456, 460. *Trust Co. v. Transit Lines*, 415; *Williams v. Hooks*, 419.

3. Where the Superior Court judge, upon appeal from the order of the clerk of the court in appointing or removing executors or administrators of an estate, has exercised his discretion in retaining the cause in the Superior Court instead of remanding it to the clerk, the exercise of this discretion is not reviewable on appeal to the Supreme Court. *In re Estate of Wright*, 630.

4. No appeal will lie from action of trial court in setting aside verdict in his discretion. *In re Beal*, 754.

APPEAL AND ERROR J—*Continued.*

c Of Findings of Fact (Of findings of Industrial Commission see Master and Servant F i).

1. Where a jury trial is waived and the court finds the facts by agreement of the parties, his findings, supported by sufficient evidence, are conclusive on appeal. *Wood v. Trust Co.*, 105; *Roebuck v. Surety Co.*, 196.

2. The findings of fact by the referee approved by the trial judge, supported by competent evidence, cannot be reviewed in the Supreme Court on appeal. *Wallace v. Benner*, 124; *Moore v. Brinkley*, 457.

3. The findings of fact by the lower court in qualifying or allowing a witness to testify as an expert is conclusive on appeal when supported by evidence. *Nance v. Fertilizer Co.*, 702.

d Presumptions and Burden of Showing Error

1. Upon division of opinion of the Justices on appeal, one Justice not sitting, the judgment of the lower court will be affirmed, in this case without becoming a precedent. *Parsons v. Board of Education*, 88, 795; *Durham v. Lloyd*, 803.

2. On appeal the presumption is against the appellant and the burden is on him to show clearly not only that error was committed in the lower court, but that it was substantial or prejudicial. *Hayes v. Lancaster*, 293; *Combs v. Paul*, 382.

e Harmless Error

1. On appeal the presumption is against the appellant and the burden is on him to show clearly not only that error was committed in the lower court, but that it was substantial or prejudicial. *Hayes v. Lancaster*, 293; *Combs v. Paul*, 382.

2. Under the evidence in this case *Held:* a question asked the court by the jury which had received the case, and pending their deliberation, if they should consider an intersecting highway the center of the road leading the other way: *Held*, the reply of the court that it was for them to determine under the facts and circumstances of the case, if error, was not prejudicial or reversible. *Murphy v. Coach Co.*, 92.

3. Plaintiff held not to be prejudiced by allowance of amendment to answer in this case. *Gholson v. Scott*, 429.

4. Where in caveat proceedings separate issues as to mental capacity and undue influence are submitted to the jury, their verdict on the issue of undue influence in favor of the caveators will not be held to render error in the trial in regard to the issue of mental capacity harmless, the court having instructed them not to consider the issue of undue influence if the issue of mental capacity were answered in favor of propounders, and it being permissible to infer that the second issue was perfunctorily answered. *In re Will of Brown*, 440.

5. Exception to admission of evidence will not be sustained where evidence of identical import has been admitted without objection. *Bank v. Florida-Carolina Estates*, 480; *Nance v. Fertilizer Co.*, 702; *Indemnity Co. v. Perry*, 765.

APPEAL AND ERROR J e—*Continued.*

6. Instruction in this case held not to contain prejudicial error. *Grier v. Woodside*, 759.

7. Refusal of court to submit issue tendered held not reversible error in this case. *Indemnity Co. v. Perry*, 765.

g Questions Necessary to Determination of Cause

1. In this case the demurrer of the defendant made in the Supreme Court on appeal on the ground that the complaint failed to state a cause of action being allowed: *Held*, the question of venue appealed from became immaterial. *Parsons v. R. R.*, 54.

2. In a suit by adjacent property owners and a city to restrain the erection of a gasoline filling station on the ground that it would violate a zoning ordinance and cause irreparable injury to the property of the individual owners and on the ground that a permit had not been obtained from the city building inspector, the trial judge held the zoning ordinance of the city void, but continued the restraining order to the final hearing because of failure to obtain the building permit: *Held*, the plaintiffs' exception to the holding that the ordinance was void preserves their rights, certainly to the final hearing, and the trial court, in view of the reasons assigned for continuing the injunction, was not required to pass upon the validity of the zoning ordinance, and his judgment therein will be disregarded for the time being. *Goldsboro v. Supply Co.*, 405.

K Determination and Disposition of Cause.

a Remand for Necessary Parties

1. Where an appeal presents the question of the priority of deeds, mortgages and deeds of trust, but it appears that all parties having an interest in the subject-matter are not before the court, the cause will be remanded in order that they may be made parties to the action, and the judgment of the court below will be vacated without prejudice. *Cooper v. Trust Co.*, 724.

c Questions Open to Adjudication After Determination of Cause

1. Where an insolvent corporation has executed to a bank its promissory note with endorsers thereon, and has submitted to a confession of judgment on the note for the purpose of releasing itself and its endorsers, but which did not have the effect of releasing the latter, if the endorsers have any remedy against the bank by accounting they may be presented through a referee appointed by the court to pass upon all claims that may be asserted against the corporation maker of the note. *Trust Co. v. Lewis*, 286.

2. Where it has been finally adjudicated, in an action involving the question, that a city may not pledge its faith and credit by executing a note for the purchase of hospital equipment, but may purchase such equipment out of available funds in its treasury, and later the city claims to have done so out of available funds: *Held*, an order reinstating the case and making the bank which had formerly accepted the note, which had been canceled, and the seller of the equipment parties, is error, the judgment entered on the former appeal being final and not subject to be revived, the only

APPEAL AND ERROR K c—*Continued.*

question remaining being whether the city had the available funds for the purpose, in which the new parties were not interested. *Nash v. Monroe*, 729.

d Modification and Affirmance

1. The agreement of both parties to a modification of the judgment as to the amount of the recovery is upheld on appeal. *Wood v. Trust Co.*, 105.

APPEARANCE.

A General Appearance.

b Appearance Constituting Waiver of Service of Summons

1. Where the summons against the owners of land has been returned "not to be found" in a proceeding to foreclose tax sale certificates against the land, and the owners have thereafter appeared and submitted themselves to the jurisdiction of the court by answering or otherwise, they are bound by the decree of foreclosure and by the final adjudication regularly arrived at in the course of the procedure under the provisions of the statute. *Orange County v. Jenkins*, 202.

2. Where the shareholders in an insolvent bank appear in reply to a motion to show cause why a preliminary assessment of their statutory liability should not be made against them, and by motion, challenge the validity of the order making the assessments, and not solely for the purpose of challenging the jurisdiction of the court, their motion is a general appearance, though upon its face it is called a special appearance. *Corporation Commission v. Bank*, 422.

ARBITRATION AND AWARD.

C Arbitrators and Proceedings.

a Selection and Qualification of Arbitrators

1. Where a contract of fire insurance provides that in case of loss where the insurer and insured cannot agree upon the amount that they should appoint a disinterested person, and that the two thus selected should appoint a third, the general qualifications of the persons thus selected are that they should not be interested, biased, or prejudiced, and evidence that the person appointed by the insurer was frequently employed by the insurer who paid him a fee is not conclusive that such appointee is not qualified, but is evidence to go to the jury as to his qualification. *Hill v. Insurance Co.*, 502.

E Attacking Validity of Award and Award as Defense to Action.

c Setting Aside Award for Fraud or Irregularity

1. Where an arbitration stipulation in a policy of fire insurance requires that in case of loss the insurer and insured should each select a competent and disinterested person to act for them, and the persons thus selected should select a third to act in case they could not agree, and there is evidence that the insurer had selected one of its experienced adjusters who induced the arbitrator selected by the insured, inexperienced in such matters, to sign an award under

ARBITRATION AND AWARD E c—*Continued.*

the misrepresentation that the third arbitrator would have to pass upon the amount of the loss, and with this understanding the award was signed, and that the award was grossly inadequate: *Held,* sufficient to be submitted to the jury upon the issue of the actionable fraud of the insurer vitiating the award. *Hill v. Insurance Co.,* 502.

d Effect of Void Award and Trial of Issues

1. Where a policy of fire insurance contains an agreement to arbitrate the amount of loss thereunder in case of disagreement between the insurer and insured, each to select a disinterested person and the two thus selected to select a third to act in case they did not agree, and the evidence is sufficient to go to the jury on the question that the award was conditionally signed and there was evidence of fraud vitiating this feature of the policy, parol evidence as to the amount of the loss sustained by fire under the terms of the policy is competent to show the loss actually sustained by the insured, not in contradiction of the written instrument, for upon the establishment of the fraud the relevant portion of the policy is disregarded. *Hill v. Insurance Co.,* 502.

ARREST—Bail see Bail.

ASSAULT AND BATTERY.

A Civil Actions.

a Definition of Assault and Battery

1. An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of the blow, it being without the consent of the person on whom the offer of violence was made or who actually received the blow, the combination of the two being denominated assault and battery in law. *Hayes v. Lancaster,* 293.

c Defense of Property as Defense to Action for Assault and Battery

1. Where the evidence in an action to recover damages for an assault is to the effect that during a dispute as to credits upon a check of plaintiffs held by the defendant the latter produced the check which the former seized and attempted to take away with him, whereupon the defendant seized him and struck him, or scuffled with him for its possession, an instruction is erroneous that only permitted the defendant to use such force to retain his property as would not amount to a breach of the peace, he having the right to use such increasing force as was necessary under the circumstances for the protection of his property, the question of excessive force being for the jury. *Curlee v. Scales,* 612.

2. The possessor of personal property for himself or as the agent or employee of another has the right to defend and protect it against aggression, and in so doing he may use such force as is reasonably necessary subject to the qualifications that, in the absence of felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted. *Ibid.*

ASSAULT AND BATTERY—*Continued.*

B Criminal Prosecution (Assault with intent to kill see Homicide D).

c Assault with Deadly Weapon

1. As to whether a pair of handcuffs will be considered as a deadly weapon ordinarily depends upon their size, the material of which made, the relative strength and weakness of the assailant and assailed, and is usually a question for the jury, and under an indictment for a felonious killing, evidence that the assailant struck the deceased with a pair of handcuffs with other evidence tending to show that other causes resulted in the death of the deceased, an instruction "that an assault, when made with an instrument such as a pair of handcuffs would constitute in law an assault with a deadly weapon" is error, the question being for the determination of the jury. *S. v. Watkins*, 692.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

A Nature and Operation.

a Rights and Duties of Assignee

1. Duties of receiver of insolvent corporation are not substantially the same as those of assignee for benefit of creditors. *Vanderwal v. Dairy Co.*, 314.

e Transfer of Bulk of Property

1. A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of C. S., 1609, as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent. *Vanderwal v. Dairy Co.*, 314.

2. Transfer of bulk of corporate property to another corporation is not binding on creditors not agreeing thereto. *Bank v. Furniture Co.*, 371.

3. Vendors of a shoe shop sold their business under a written agreement that they, the vendors, would pay the outstanding obligations of the business. One of the creditors of the business at the time of the transfer sued to recover from the purchaser the amount of the indebtedness, and offered evidence tending to contradict the writing and holding the purchaser liable: *Held*, the parol evidence is inadmissible, and the question of whether the bulk-sales statute had been complied with was immaterial, C. S., 1013, since under the provisions of the statute the creditor, at most, would be entitled to have the transfer set aside, but not to hold the purchaser personally liable. *Goldman & Co. v. Crank*, 384.

ATTACHMENT—for purpose of obtaining jurisdiction see Process B c.

ATTORNEY AND CLIENT (Knowledge of attorney not imputed to client see Mortgages H p 2; excusable neglect see Judgments K b).

E Disbarment.

b Proceedings

1. The courts have inherent as well as statutory power to strike from their rolls names of attorneys who are found by reason of their

ATTORNEY AND CLIENT E b—*Continued.*

conduct unfit and unworthy, and where the court proceeds under its inherent power only to the extent of appointing a committee of investigation without record of further proceedings or conclusions, and the statutory method has also been pursued, the statutes should be strictly followed. C. S., 208, *et seq.* *Committee of Grievances of Bar Asso. v. Strickland*, 630.

2. The statutory proceedings to disbar an attorney for improper conduct, C. S., 208, *et seq.*, requires that the prosecution be instituted only by the written accusation of the Committee on Grievances of the North Carolina State Bar Association, accompanied by written affidavit of the person making a charge specified in the act, the accusation to be submitted to the solicitor who shall draw it up citing the accused to appear, and where the solicitor does so upon the written accusation of the Grievance Committee he may not add thereto other charges of misconduct, and where the accused is acquitted by a jury of the accusation of the Grievance Committee he may not be convicted of charges added by the solicitor, and is entitled to his discharge as to all counts. *Ibid.*

AUTOMOBILES—Law of highway and negligence thereon see Highways B; master's liability for negligent driving of servant see Master and Servant D a 2; parent's liability for negligent driving of child see Parent and Child A a; city's liability for accident from defective condition of street see Municipal Corporations E c 2, 3, 4.

BAIL.

B In Criminal Actions.

c *Liabilities on Bail Bonds*

1. Where a bail or appearance bond in a criminal action provides that the defendant would appear for trial at a certain term of court, and "not depart the court without leave," the force of the bond continues until the case is finally disposed of, and where the trial court after conviction of the defendant permits him to go at large under the security of the bond so given, without the knowledge of the absent surety, and the defendant leaves the jurisdiction of the court before judgment is pronounced, and so remains at large, the surety is liable on the bond according to its tenor and import. *S. v. Staley*, 385.

BANKRUPTCY.

C Administration, Management, and Collection of Estate.

c *Transfers and Preferences by Bankrupt*

1. A payment upon a debt owed by an insolvent within the four months period specified in the Bankruptcy Act will not be declared void by the courts unless the creditor receiving the payment had actual knowledge of the insolvency at the time, or knowledge of such facts as would have put a reasonable man under the circumstances upon inquiry leading to such knowledge of insolvency, and the fact that the bankrupt sent out notices of his insolvency to other creditors generally will not affect the validity of the payment if the one receiving the payment was in ignorance thereof. *Burns v. Trust Co.*, 260.

BANKRUPTCY C c—*Continued.*

2. The offset by a bank of the deposit of a bankrupt against his note is not a prohibited preference within the meaning of the Bankrupt Act. *Ibid.*

3. In order for a payment made within four months of bankruptcy to be an invalid preference under the provisions of the Bankrupt Act, the debt must be a preëxisting one and not for a present valuable consideration. *Bridgers v. Hart*, 685.

4. Where under a request and promise to repay expenses an officer of a corporation advances his own money to finance a trip for himself and others taken in the interest of the corporation which results to the advantage of the corporation, and takes several days in its accomplishment, and these expenses are refunded by the corporation several days afterward, the question is for the jury under the evidence and correct instructions from the court as to whether the taking of the trip and the refund of the expenses constituted one transaction, and if found by the jury in the affirmative it will not constitute an unlawful preference within the meaning of the Bankrupt Act. *Ibid.*

d Filing and Proof of Claim

1. Where the maker of a note and the administratrix of a deceased endorser are sued by the payee, and the administratrix has paid the note and seeks to recover from the maker, and the maker sets up that he had been discharged in bankruptcy from liability on the claim, although he had failed to list the claim in the schedule of his liabilities, and introduces evidence tending to show without contradiction that the payee and the administratrix had actual notice of the bankruptcy proceedings in ample time to have filed the claim within six months after the adjudication of bankruptcy: *Held*, sufficient to support an instruction that if the jury believed the evidence, they should answer the issue in defendant's favor as to whether the claim was barred, and an instruction in effect directing a verdict for the administratrix if she had no notice or opportunity to attend the first creditor's meeting, is reversible error. *Johnson v. Fountain*, 388.

2. Under the provisions of the Bankrupt Act a person securing the debt of a bankrupt by individual undertaking may prove the claim against the bankrupt in the creditor's name, or if he discharges the claim in whole or in part he is subrogated to the rights of the creditor, and failure to prove a claim provable under this provision results in the claim being barred by the bankrupt's discharge. *Ibid.*

BANKS AND BANKING (Right of bank to offset bankrupt's deposit against note see Bankruptcy C c 2).

C Functions and Dealings.

b Representation by Officers and Agents (Receiver estopped to deny president's authority to execute contract see Estoppel C b 4).

1. The vice-president, cashier, or other head official of a bank has no implied authority by virtue of his office to release the endorsers or sureties on a note upon the confession of judgment by the principal. *Trust Co. v. Lewis*, 286.

BANKS AND BANKING—*Continued.*

H Insolvency and Receivership of Banks (Right of receiver to execute power of sale in deed of trust wherein bank is trustee see Mortgages H h 1, 2, 3; receiver estopped to deny president's authority to execute contract see Estoppel C b 4).

a Statutory Liability of Stockholders

1. Prior to the enactment of chapter 113, Public Laws of 1927, the procedure, under the statutory provisions for the enforcement of the statutory liability of shareholders of an insolvent bank in a receiver's hands, was by order of court based upon the report of receiver to the shareholders to show cause why the assessment made against them should not be enforced, the original assessments not being final or conclusive, but only preliminary to the order that the shareholders be made parties to the action, giving them the right to set up any defense in law or fact, and where this procedure has been followed and stockholders appear and answer to the merits the position is not available to them that they were not parties to the action at the time the assessment was made. *Corporation Commission v. Bank*, 422.

BILLS AND NOTES.

D Construction and Operation.

b Liabilities of Parties

1. A parol agreement between an official of a bank that the bank would release the endorsers or sureties on a note upon the maker confessing judgment thereon is not enforceable, the agreement being in derogation of the written terms of the instrument. C. S., 3104. *Trust Co. v. Lewis*, 286.

G Payment and Discharge.

b Discharge by Judgment

1. A confessed judgment by the maker of a note merges the note in the judgment and operates as a discharge of the note as between the maker and the payee, but does not operate as a discharge of the endorsers or sureties on the note unless they are parties to the judgment. *Trust Co. v. Lewis*, 286.

c Payment to Collecting Agent

1. Where the plaintiff bank, the purchaser of a draft, brings action against the acceptor thereof, and the acceptor pleads payment to the drawer as the duly authorized collecting agent of the bank, evidence that the bank and the drawer had entered into an agreement providing that the bank would purchase, from time to time, drafts of the drawer accepted by its customers, and that the drawer would collect the money from its customers and account to the bank therefor, *is held* competent as tending to establish the fact of agency relied on by the defendant. *Bank v. Howell*, 637.

2. Where the plaintiff bank, the purchaser of a draft, brings action thereon against the acceptor thereof, and the acceptor pleads payment to the drawer as the authorized collecting agent of the bank, evidence that pursuant to an agreement between them the drawer

BILLS AND NOTES G c—*Continued.*

had for many years regularly collected money from its customers on drafts accepted by them and purchased by the plaintiff, and had accounted to the bank therefor, is held competent as tending to establish the fact of agency, and that the agency was in force at the time of the payment by the defendant to the drawer. *Ibid.*

3. A bank purchased an accepted draft from a dealer in automobiles given in part payment of the purchase price of an automobile by its customer, and in an action by the bank thereon there was evidence that an employee of the bank, after ascertaining from the drawer that the acceptor had paid him, told the acceptor that the bank would look to the drawer for payment: *Held*, entries on the books of the bank subject to inspection by its officers and directors showing that all payments on the draft after the date of the statement by the employee were paid by the drawer, and after that date the bank made no more demands upon the acceptor until the insolvency of the drawer, are competent as tending to show ratification by the bank of the statement of its employee. *Ibid.*

H Actions on Notes (Burden of proving fraud as defense to action on note see Fraud C d 1).

b Pleadings

1. The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee, and where the answer after the plaintiff's motion to strike irrevelant and immaterial matter therefrom had been granted, sufficiently alleges that the holder was not a holder in due course for value without notice, the order allowing the motion to strike out will not be held for error, all defenses which the defendant may have being presentable under the pleadings. C. S., 3009, 3033, 3038, 3040. *Bank v. Atmore*, 437.

BOUNDARIES see Deeds and Conveyances D.

BROKERS AND COMMISSIONMEN.

D Compensation.

a Under Terms of Contract

1. Where a contract provides for the payment by a manufacturing corporation of commissions to a selling agent upon "net sales" in a given territory, the manufacturer reserving the right of cancellation of orders obtained by the selling agent, and the parties, while peacefully living thereunder in its performance, have practically interpreted the words "net sales" to mean sales completed by delivery of goods: *Held*, the selling agent is entitled to commissions only on orders completed by actual delivery, and a subsequent supplemental agreement relating to "acceptance of orders" will be construed with reference to its object of relating orders to capacity output, and not to the payment of commissions, and it does not vary the original terms in regard to commissions, the original terms

BROKERS AND COMMISSIONMEN D a—*Continued.*

in this regard being expressly preserved in the supplemental agreement, and the submission of the contract to the jury in this case is held for error. *Cole v. Fibre Co.*, 484.

CARRIERS.

B Carriage of Goods.

b Rates and Contracts Relating Thereto

1. Where a railroad company lawfully agrees to transport freight to a certain point on its line for the defendant at a certain rate, the railroad company has given up a legal right which is sufficient to support the agreement of the shipper to exclusively use its line, although thereafter the rate would be available to all shippers in the same circumstances, and the railroad company may recover damages from the shipper for breach of performance on his part. *R. R. v. Ziegler Brothers*, 396.

D Passengers.

b Fares, Tickets and Charges

1. Where in an action against a railroad company the complaint alleges that the plaintiff, informed of the amount of fare for a proposed trip by the company's agent in another state, reckoned that she had sufficient money for the trip, and went to the ticket agent at the point of departure, and was misinformed by him of the amount of the fare, and that she voluntarily paid him the erroneous amount named by him, which was in excess of the correct amount, and started on the trip, and that as a result she was without sufficient money for food, hotels, etc., en route, is *held:* insufficient to warrant a recovery against the railroad for the inconvenience caused by the lack of money, and a demurrer *ore tenus* on the ground that the complaint failed to state a cause of action, made in the Supreme Court, will be sustained. *Parsons v. R. R.*, 54.

CHARITIES (Exemption of property of charities from taxation see Taxation B d 1).

A Creation and Validity of Gifts to Charity.

c Definiteness of Purpose and Designation of Beneficiaries

1. A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. N. C. Code of 1927, secs. 4033-4035. *Whitsett v. Clapp*, 647.

CHATTEL MORTGAGES (Receiver takes property subject to registered, see Corporations H b 1).

A Requisites and Validity.

a Nature and Essentials of Chattel Mortgages in General

1. Where the written agreement between the parties is in legal effect a chattel mortgage it will be so construed though upon its face it purports to be a lease contract. *Berry v. Ellis*, 283.

CLERKS OF COURT (Surety not necessary party in action to separate personal and official funds see Parties B b 2).
  C Jurisdiction.
    a In General
      1. The equitable jurisdiction of the Superior Courts does not extend to the clerks of court unless expressly given by statute, and C. S., 4023 *et seq.* giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. *In re Estate of Smith*, 272.
    b Estates of Lunatics
      1. The clerk of the Superior Court has only such powers as are conferred on him by statute, and his statutory powers to appoint a guardian for one who has been adjudged a lunatic, C. S., 2285, and the provision requiring such guardian to account to him in the administration of the estate, C. S., 2183-2188, and the power of the clerk to order the guardian to expend such sums as may be found by him necessary for the support of the lunatic and the members of his family dependent on him, does not give the clerk authority to order the guardian to pay debts of the lunatic contracted prior to the adjudication of lunacy. *Read v. Turner*, 773.
    c Estates of Decedents
      1. Clerk of court has power to remove executor or administrator for cause. *In re Estate of Wright*, 620.

CITIES AND TOWNS see Municipal Corporations.

COMMON LAW—Presumed to be in force in another state see States A a 7.

CONCEALED WEAPONS.
  A Elements of Crime of Carrying Concealed Weapon.
    a Concealment of Weapon
      1. The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of C. S., 4410, although the statute makes such possession prima facie evidence of the concealment thereof. *S. v. Vanderburg*, 713.

CONFESSIONS see Criminal Law G 1.

CONFLICT OF LAWS see States A a.

CONSOLIDATED STATUTES (For convenience in annotating).
  (Construction and operation of statutes see Statutes.)
  SEC.
    1, 31, 4139. Clerk of court has power to remove executor for cause. *In re Estate of Wright*, 620.
    10, 137, 2522. Where wife of insured is named beneficiary and insured kills wife and then himself the proceeds descend to heirs of wife. *Parker v. Potter*, 348.
    160. Action against individual defendant held barred, he not being party to prior action nonsuited. *Davis v. R. R.*, 345.

CONSOLIDATED STATUTES—*Continued.*

SEC.

208. Where statutory procedure for disbarment is followed the statute must be strictly complied with, and solicitor may not add charges to those of Grievance Committee. *Committee on Grievances of Bar Association v. Strickland*, 630.

339. Surety company is held to same liability as individual surety. *Roebuck v. Surety Co.*, 196.

411. Action in this case held not barred by ten-year statute, the defendant being out of State part of time. *Miller v. Miller*, 458.

428. Deed of wife to husband held to be color of title. *Potts v. Payne*, 246.

430. Title to streets may be acquired by twenty years adverse possession as against rights of grantee of deeds giving easements therein. *Gault v. Lake Waccamaw*, 593.

435. Where offer of dedication has not been accepted, title to streets as against town may be acquired by twenty years adverse possession. *Gault v. Lake Waccamaw*, 593.

441. Right of action on warranty held to have accrued at time when attempts to remedy defect were abandoned. *Heath v. Furnace Co.*, 377.

442(2), 2306. Where action is brought on note the defense of usury is not barred by lapse of two years. *Pugh v. Scarboro*, 59.

443, 407. Mental disability resulting from assault is defense to plea of statute of limitations. *Hayes v. Lancaster*, 293.

456. Principal's liability need not be determined before bringing action against surety, and surety is proper party. *Watson v. King*, 8.

475. Where joinder of new defendant constitutes new action, time will be computed from date of service on him. *Jones v. Vanstory*, 582.

460. Motion for joinder of proper party is addressed to discretion of court, and refusal of motion is not error. *Trust Co. v. Transit Lines*, 415; *Williams v. Hooks*, 419.

483. Personal service on directors of corporation as trustees is not service on corporation. *Jones v. Vanstory*, 582.

484. Statutory provisions for service by publication held substantially complied with in this case. *Bethell v. Lee*, 755. Affidavit is not necessary in proceedings to foreclose tax sale certificate. *Orange County v. Jenkins*, 202.

491. Personal service on nonresident held not to be void for failure of affidavit as to residence of defendant. *Casualty Co. v. Green*, 535.

509. Does not affect right of Superior Court judge to extend time for filing answer. *Washington v. Hodges*, 364.

510. Remedy from judgment upon appeal from order of clerk in refusing to strike out answer as sham and frivolous is by exception and appeal and not motion in original cause. *Wellons v. Lassiter*, 474.

521. Definition of counterclaim. *Insurance Co. v. Griffin*, 251.

CONSOLIDATED STATUTES—*Continued.*

SEC.

536, 510. Superior Court has authority to hear appeal from order of clerk striking out defendant's answer as sham and frivolous. *Wellons v. Lassiter*, 474.

545, 547. Plaintiff held not prejudiced by allowance of amendment to answer in this case. *Gholson v. Scott*, 429.

545, 912. Notice of motion to amend after time for filing answer has expired must be given defendant, but right to object thereto held waived in this case. *Discount Corp. v. Butler*, 709.

564. Slight inaccuracies in charge held not prejudicial. *S. v. Sterling*, 18.

567. Upon motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Smithwick v. Pine Co.*, 519; *Nance v. Fertilizer Co.*, 702; *Madrin v. R. R.*, 784. Motion must be renewed at close of defendant's evidence in order to present question of sufficiency on appeal. *Lee v. Penland*, 340. After refusing motion court may not set aside verdict for insufficiency of evidence. *Lee v. Penland*, 340. Plaintiff may not take voluntary nonsuit over defendant's objection where answer sets up counterclaim. *Insurance Co. v. Griffin*, 251.

573. Court may order compulsory reference. *Cotton Mills v. Maslin*, 328.

578, 579. Court may affirm, modify, set aside, or disaffirm report of referee. *Wallace v. Benner*, 124.

600. Order setting aside judgment under this section is affirmed in this case. *Cagle v. Williamson*, 727. Does not apply to pleadings. *Washington v. Hodges*, 364.

626. It is necessary to submission of controversy that the subject-matter could be basis for civil suit. *Hicks v. Greene County*, 73.

637. Upon appeal from order of clerk removing executor Superior Court obtains jurisdiction of entire matter. *In re Estate of Wright*, 620.

565, 966, 564. Refusal of requested instruction held not error, charge being in substantial compliance with C. S., 564.

981. Industrial Commissioner may punish witness for contempt. *In re Hayes*, 134.

1013. Purchaser of bulk of insolvent's property is not liable for insolvent's debts, remedy being merely to set aside conveyance. *Goldman & Co. v. Crank*, 384.

1140. Judgment against corporation on contract is not given priority under this section. *Manufacturing Co. v. Cotton Mills*, 10.

1209, 1210. Execution of power of sale by receiver of trustee held valid under facts of this case. *Trust Co. v. Hudson*, 688.

1297. Authorizes county to levy special taxes in excess of constitutional limitation for maintenance of county home. *R. R. v. Lenoir County*, 494.

1608 (cc). On appeal from county court exceptions should be made in Superior Court to present questions for review upon appeal to Supreme Court. *Smith v. Texas Co.*, 39.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1609. Does not apply where property transferred does not constitute bulk of insolvent's property. *Vanderwal v. Dairy Co.*, 314.

1696. Damages may not be recovered for slight change in highway resulting in mere inconvenience. *Crowell v. Power Co.*, 208.

1734. Conveyance to A. and heirs of her body begotten by her husband T. conveys estate tail special converted into fee by this section. *Morehead v. Montague*, 497.

1744. Life tenant may maintain action for sale of interests for reinvestment. *Stepp v. Stepp*, 237.

1749. Where laws of another state are material they may be proven by its authorized statutes and reports, and when properly in evidence they must be interpreted by the court. *Howard v. Howard*, 574.

2161, 2162. Surety on bond of bank acting as guardian is liable for loss occasioned by bank intermingling funds. *Roebuck v. Surety Co.*, 196.

2183-2188. Clerk of court has no jurisdiction to order guardian of lunatic to pay debt contracted prior to adjudication of lunacy. *Read v. Turner*, 773.

2306. Plaintiff in action to recover usurious interest is entitled to recover twice amount of usurious interest actually paid. *Bundy v. Credit Co.*, 512. Plaintiff held entitled to have restraining order continued to final hearing in order to have amount of debt ascertained, usury being alleged. *Wilson v. Trust Co.*, 788.

2436. Before amendment of 1929 one hauling lumber to mill under contract held not entitled to lien. *Graves v. Dockery*, 317.

2445. Where surety takes over construction and purchases directly from materialmen section does not apply; East Carolina Teachers College is not body corporate within meaning of section. *Mfg. Co. v. Hudson*, 542.

2522. Applies where it is admitted that husband feloniously killed wife. *Parker v. Potter*, 348.

2591. Deed of purchaser at foreclosure sale will not be declared void for failure of clerk to order trustee to make deed. *Cheek v. Squires*, 661.

2594(5). Has no application to mortgages given prior to passage. *Roberson v. Matthews*, 241.

2594 (a) (b). Deed of purchaser at foreclosure sale will not be declared void for trustee's failure to make entry on margin of record or for his failure to file statement. *Cheek v. Squires*, 661.

2621(a) (c). Evidence of defendant's violation of section in parking on highway held sufficient to be submitted to jury. *Smithwick v. Pine Co.*, 519.

2631(59) (a). Failure to give statutory signals when stopping or turning off highway is negligence. *Murphy v. Coach Co.*, 93.

CONSOLIDATED STATUTES—*Continued.*

Sec.

2796, 2937. City is authorized to issue bonds for public hospital with approval of voters. *Burleson v. Board of Aldermen*, 30.

2971 (185). Failure to list personalty for taxation will not bar action to recover for its negligent destruction. *Nance v. Fertilizer Co.*, 702.

3009, 3033, 3038, 3040. Motion to strike out properly allowed, the defendant having a right to present all defenses to action on note after allowance of motion. *Bank v. Atmore*, 437.

3104. Parol agreement to discharge endorsers held unenforceable. *Trust Co. v. Lewis*, 286.

3311. Does not apply to equitable subrogation to first lien by party advancing funds for payment of first mortgage. *Wallace v. Benner*, 124.

3846(j). City is not relieved of liability for defect in street by fact that Highway Commission had taken over construction. *Pickett v. R. R.*, 750.

3893. Amount to be paid expert witness is within discretion of trial court and need not be determined before witness is forced to testify. *In re Hayes*, 133.

4023. Clerks of court have no equitable jurisdiction unless plainly conferred by statute. *In re Estate of Smith*, 272.

4033, 4035. Charity will not be declared void for indefiniteness because for benefit of indefinite class if its purposes are sufficiently defined. *Whitsett v. Clapp*, 647.

4213. Elements of offense held not sufficiently explained to jury in charge. *S. v. Vanderburg*, 713.

4162. Devise will be construed to be in fee unless intent is expressed to convey an estate of less dignity. *Bell v. Gillam*, 411; *Henderson v. Power Co.*, 443.

4200. Evidence that crime was murder in first degree held sufficient. *S. v. Sterling*, 18.

4410. Possession of pistol on premises of another is not alone sufficient for conviction. *S. v. Vanderburg*, 713.

4622. Motion for consolidation of action is addressed to discretion of court. *S. v. Combs*, 671.

4643. Upon motion to nonsuit evidence must be considered in light most favorable to the State. *S. v. Marion*, 715.

4650, 4651. Statutory requirements for appeal *in forma pauperis* must be strictly complied with or appeal will be dismissed, but in this case defect in affidavit held cured. *S. v. Marion*, 715.

5427, 5458. Upon appeal from removal of committeemen judgment holding act of board of education invalid and dismissing action for want of jurisdiction is inconsistent. *Board of Education v. Anderson*, 57.

5533. Mandamus will not lie to compel county superintendent to approve election of teacher. *Cody v. Barrett*, 43.

CONSOLIDATED STATUTES—*Continued.*

Sec.

5960, *et seq.* Jurat of absentee voters is only prima facie evidence that voters had sworn thereto. *Bouldin v. Davis,* 24.

6136, 6137. One appointed by county forest warden to assist in fighting forest fire is employee within meaning of Compensation Act. *Moore v. State,* 300.

6214. Where asylum patient has been discharged as cured under section there is no presumption of mental incapacity from fact of commitment. *In re Will of Crabtree,* 4.

6464. Creditors may not claim that change of beneficiary was fraudulent as to them. *Teague v. Insurance Co.,* 450.

6821, 6823, 6864, 6889. Private in National Guard held entitled to compensation under Workmen's Compensation Act. *Baker v. State,* 232.

7075. Authorizes county to levy special tax in excess of constitutional limitation for preservation of public health. *R. R. v. Lenoir County,* 494.

7971 (56). Under facts of this case injunctive relief against collection of tax levied under this section would lie. *Barber v. Benson,* 683.

7979. In this case remedy to test validity of ordinance imposing license tax was by payment and action to recover, and not by injunction. *Loose-Wiles Biscuit Co. v. Sanford,* 467. Injunctive relief on equitable grounds would lie in this case. *Barber v. Benson,* 683.

8006, 1220, 8003, 2815. Lien for taxes attaches to realty on statutory date, but does not attach to personalty until levy thereon, and creditor failing to point out personalty is not entitled to have taxes paid therefrom. *Shale Products Co. v. Cement Co.,* 226.

8037. Statutory notice of foreclosure of tax sale certificate held constitutional. *Orange County v. Jenkins,* 202. Where county enforces lien under this section the limitations therein prescribed apply. *Shale Products Co. v. Cement Co.,* 226.

CONSTITUTION (For convenience in annotating).

Art.

I, sec. 17. Statutory procedure for foreclosure of tax sale certificates does not violate constitutional rights. *Orange County v. Jenkins,* 202. Statutory provision that Highway Commission may take land before assessing compensation does not violate constitutional rights. *Highway Commission v. Young,* 604.

I, sec. 19. Trial by jury is not constitutional right under Workmen's Compensation Act. *Hagler v. Highway Commission,* 733.

IV, secs. 1 and 20. Superior Courts are given jurisdiction of suits formerly within jurisdiction of courts of equity. *In re Estate of Smith,* 272.

V, sec. 1. County may not levy tax which is in fact a poll tax in excess of two dollars. *Dixon v. Commissioners of Pitt,* 215.

V, secs. 3, 5. Property held in trust for sale and distribution of part of proceeds to religious organizations held not exempt from taxation.

CONSTITUTION—*Continued.*

ART.

Latta v. Jenkins, 255. Property lawfully owned by city is exempt from taxation regardless of county in which property is situated. *Andrews v. Clay County*, 280.

V, sec. 6. Legislative authority to levy special taxes may be given by special or general act. *Burleson v. Board of Education*, 30; *R. R. v. Lenoir County*, 494.

VII, sec. 7; Art. V, sec. 6. Right of cities to issue bonds. *Burleson v. Board of Education*, 30.

XII, sec. 2. Private in National Guard held entitled to compensation under Workmen's Compensation Act. *Baker v. State*, 232.

CONSTITUTIONAL LAW (Constitutional requirements and restrictions on taxation see Taxation A; courts will not anticipate questions of, see Appeal and Error A e; right to trial by jury see Jury C).

A Governmental Powers and Departments.

a Legislative (Power to tax see Taxation A).

1. It will be presumed that Legislature has not exceeded its powers, and a statute will not be declared unconstitutional unless clearly so. *Chimney Rock Co. v. Lake Lure*, 171.

E Obligations of Contract.

a Nature and Extent of Mandate

1. The provisions of Article I, section 10, of the Federal Constitution apply to obligations of a contract and not to other vested rights, and in this case *held:* the Federal provision has no application to the amendment of 1921 to Art. V, sec. 1, of the State Constitution relating to the limitation upon poll taxes, the amendment not affecting obligations of a contract prohibited by the Federal Constitution. *Dixon v. Commissioners of Pitt*, 215.

I Due Process of Law: Law of the Land.

b What Constitutes Due Process

1. The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution, and is not a taking of property inhibited by Art. I, sec. 17, of the Constitution of North Carolina. *Orange County v. Jenkins*, 202.

2. Provision that State Highway may take lands before assessing compensation does not violate constitutional rights. *Highway Commission v. Young*, 603.

CONTEMPT OF COURT.

A Acts constituting Contempt and Essentials of the Offense.

c Contempt of Courts, Quasi-Judicial Bodies or Boards

1. The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpœna witnesses and have them give evidence at the hearing, acts in a judicial

CONTEMPT OF COURT A c—*Continued.*

capacity in adjudging in contempt a witness who refuses to give material evidence and in imposing a sentence or a fine or imprisonment under the provisions of C. S., 981. *In re Hayes*, 133.

C Power to Punish for Contempt.

a Nature and Extent of Power

1. The attending physician of a claimant under the Workmen's Compensation Act who has been duly subpœnaed to attend and give evidence at a hearing by a member of the Industrial Commission, after having been duly sworn and examined and cross-examined may not refuse to give his testimony concerning a vital matter involved on the ground that he first be qualified as an expert and his fees as such fixed, and in persistently refusing to obey the order of the chairman may be punished by fine or imprisonment, the right to so punish being inherent in the Commission and necessary for the performance of its duties, and it is not required that the power be expressly given by statute. Chapter 120, Public Laws of 1929. *In re Hayes*, 133.

CONTINUANCE see Trial A b.

CONTRACTS (Insurance contracts see Insurance; contracts to devise see Wills B; indemnity contracts see Indemnity; indemnity bonds see Principal and Surety; conflict of laws and determination of laws of which state govern contracts see States A a; contracts surviving death see Executors and Administrators C b).

A Requisites and Validity.

d Consideration

1. The giving up of a legal right to the promisor's detriment is a sufficient consideration to support a contract. *R. R. v. Ziegler Brothers*, 396.

B Construction and Operation.

a General Rules of Construction

1. The parties to a contract will be presumed to know its intent and meaning better than strangers thereto, and where they have practically interpreted the contract while living under it in its peaceful performance the courts will ordinarily give it that construction which they themselves have given it before differences arose thereunder. *Cole v. Fibre Co.*, 484.

2. In construing a contract words employed therein will be construed with reference to the subject-matter of the contract, the context, and the object sought to be accomplished by the parties, and this rule is in consonance with the rule forbidding parol evidence varying, adding to, or contradicting the terms of a written instrument. *Ibid.*

3. Construction given contract by parties thereto challenges serious consideration. *Bank v. Courtway*, 522.

4. The general laws of the State in force at the time of the execution of a contract enter into and become as much a part of the contract as if they were expressly incorporated in its terms. *Trust Co. v. Hudson*, 688.

CONTRACTS—*Continued.*

E Performance or Breach.

a Breach or Performance in General

1. Where the purchaser of trucks under conditional sales contract pays the seller the amount of the insurance premium under an agreement that the seller would insure the trucks against loss by fire, and the seller procures the insurance and so notifies the purchaser, disclosing the terms and conditions of the policy, but failing to disclose the name of the insurer, and after the death of the purchaser his administrator advises the seller that it had sold one truck to the purchaser's son, taking a mortgage for the balance of the purchase price, and asks that the seller "fix" the insurance policy to protect its interest, and in reply thereto the seller advises that in case of loss the estate of the purchaser would be paid all surplus after payment of the seller's lien: *Held*, upon the trucks being damaged by fire, evidence that the seller, knowing the terms and conditions of the policy, had failed to fix the policy as requested by the administrator and had failed to disclose the name of the insurer in time for proper proof of loss to be made, rendering the policy void because of violations of stipulations therein, is sufficient evidence to be submitted to the jury on the question of the seller's liability, and the seller's motion as of nonsuit should have been denied. *Truck Corp. v. Trust Co.*, 157.

F Actions for Breach.

a Parties

1. Where the purchaser of trucks under a conditional sales contract pays the seller the amount of the insurance premium under an agreement that the seller have the trucks insured against fire for the protection of them both, and the seller procures the policy, and the purchaser delivers one of the trucks, and after his death, his administrator delivers the other to the purchaser's son, and thereafter the trucks are damaged by fire: *Held*, the purchaser's son, not being a party to the contract of sale nor a beneficiary in the insurance policy, has no contractual relationship with either the seller or the insurer, and in an action for the possession of the trucks he may not set up a cross-action against the seller for failure to provide enforceable insurance protection or against the insurer for liability on the policy. *Truck Corp. v. Trust Co.*, 157.

c Evidence and Burden of Proof

1. Where the defendant in an action for breach of a written contract has introduced parol evidence modifying its terms, and the court has permitted an amendment to the pleadings to be made in conformity therewith, the burden is upon the defendant to establish the fact that the contract as written has been modified. *Russell v. Hardwood Co.*, 210.

CONTROVERSY WITHOUT ACTION.

A Jurisdiction and Proceedings.

b Affidavits

1. An appeal from a judgment in a controversy without action on an agreed statement of facts when the necessary affidavit has not been filed will be dismissed. *Garris v. Hardy*, 91; *Lipe v. Stanly County*, 92.

CONTROVERSY WITHOUT ACTION—*Continued.*
  B Requisites and Right to Submit Controversy.
    a Subject-Matter and Real Controversy
      1. The object or purpose of C. S., 626, is to determine upon a state of facts agreed by the parties, without the necessity of a formal action, questions in difference between them which might be the subject of a civil action, and where the questions arising upon the facts agreed to and submitted involve the validity of municipal bonds proposed to be issued, and the purchasers thereof are not made parties and will not be bound by the judgment, there is no matter involved that may be the subject-matter of a civil action, and an appeal from a judgment thereon of the Superior Court will be dismissed. *Hicks v. Greene County*, 73.

CONVERSION—Does not apply to exempt property from taxation see Taxation B d 2.

CORPORATIONS.
  C Directors.
    c Liabilities
      1. Signature of secretary in official capacity to minutes of board is not sufficient as signature of directors, and they are not personally liable on contract of indemnity thus signed. *Bank v. Courtway*, 522.

  G Corporate Powers and Liabilities (Plea of *ultra vires* may not be taken by demurrer see Pleadings D e 1).
    c Representation of Corporation by Officers and Agents
      1. Where an officer and director of one corporation deals with another corporation of which he is also an officer and director, knowledge of fraud committed by him in the interests of the former corporation will not be imputed to the latter corporation. *Cheek v. Squires*, 661.

  H Insolvency (Right of receiver to execute power of sale see Mortgages H h 1, 2)
    a Appointment, Duties and Powers of Receivers
      1. The duties of one appointed as receiver in a creditors' bill for an insolvent corporation are not substantially like those of an assignee under a general assignment for the benefit of creditors. *Vanderwal v. Dairy Co.*, 314.

    b Assets and Choses in Action
      1. A receiver of an insolvent corporation acquires and holds its property subject to the liens of mortgages executed by the corporation when insolvent that have been duly registered prior to the time of his appointment, and such mortgages are enforceable against him. *Vanderwal v. Dairy Co.*, 314.

    c Claims Against Receiver
      1. Where a claim for damages has been filed with the receivers of a transit bus line for damages for a breach of contract as lessee of a union bus station in a city which was disallowed on the grounds that the lease was invalid, approved by the Superior Court judge,

CORPORATIONS H c—*Continued.*

but reversed by the Supreme Court on appeal, holding the lease was valid and remanding the case for definite findings as to whether the lease had been breached: *Held*, on the second appeal upon the further findings that the lease had been broken by the insolvent corporation the claim is provable as an unsecured debt. *Trust Co. v. Transit Lines*, 415.

2. A cause of action for damages for the breach of a lease contract accrues from the date of the breach, and where a claim against a receiver, for breach of a lease contract by the insolvent corporation or the receiver is not filed until after the alleged breach, the receiver may not maintain that the claim was premature. *Ibid.*

e Liens, Taxes, Preferred Claims and Priorities

1. Where a city and county advertise and sell the property of a corporation for taxes and buy in the certificates of sale, and thereafter the corporation is put in a receiver's hands, in an action in the nature of a creditor's bill, the original plaintiff therein pointing out, after the tax sale and the issuance of tax certificates, personalty in the hands of the receiver and asking that the taxes against the corporation be satisfied therefrom: *Held*, the sovereign is not a party to the action, and the real property, burdened by mortgages and tax liens, not being assets of the corporation, and the creditor having failed to point out the personalty of the corporation out of which the taxes could have been paid until after the tax sale and the issuance of the tax certificates, C. S., 8006, he is not entitled to have the taxes paid out of the personalty in the hands of the receiver as against the other creditors of the corporation, and the municipalities may foreclose the tax certificates as prescribed by statute. C. S., 8037. *Shale Products Co. v. Cement Co.*, 226.

2. Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered deed of trust given to secure bondholders when the judgments were not in actions to recover for labor and clerical services performed or to recover damages for a tort committed by the defendant resulting in injury or death or for injuries to property within the meaning of C. S., 1140. *Mfg. Co. v. Cotton Mills*, 10.

I Reincorporation or Reorganization.

d Formation of New Corporation to Take Over Assets and Assume Indebtedness

1. A deed of an insolvent corporation of practically all its assets to another corporation, formed to take over its business, under an agreement that the purchasing corporation should satisfy the creditors of the selling corporation by issuing shares of stock or paying a percentage of their claims, is not binding on creditors of the selling corporation who did not agree thereto and who refuse to settle upon such basis, and who have not waived their rights, and they may have the deed to the purchasing corporation set aside. *Bank v. Furniture Co.*, 371.

2. Where two insolvent corporations have conveyed by deeds their entire assets to a corporation formed for the purpose of merging

CORPORATIONS I d—*Continued.*

them, and which continued to operate the property thus acquired, incurring further indebtedness, and subsequently placed in the hands of a receiver by order of court, the creditors of each of the selling corporations are entitled to a priority over the creditors of the merged corporation out of the assets derived from their debtor corporation respectively when they have not by their actions or conduct waived their right. *Ibid.*

COUNTERCLAIM see Pleadings C.

COUNTIES (Highways see Highways C; power to tax see Taxation).

B Officers, Agents and Employees.

b County Commissioners, Proceedings and Minutes

1. An erroneous entry in the minutes of the board of county commissioners as to the amount assessed on the one hundred dollars valuation of property is subject to correction by the board so as to make the record speak the truth and show it was not in violation of constitutional limitations. *R. R. v. Cherokee County*, 494.

2. The entries of record of the board of county commissioners relating to a correction of an erroneous entry to make it speak the truth, showing its proceedings of several sessions in that respect, is the best evidence thereof, and where matters are submitted to the judge to find the facts, and the proceedings are sufficient, his finding upholding the validity of the correction is conclusive. *Ibid.*

COURTS (Supreme Court see Appeal and Error; clerks of court see Clerks of Court; contempt of see Contempt; application of Federal Employer's Liability Act see Master and Servant E; removal of causes see Removal of Causes; upon appeal from Superior Court judgment affirming county court judgment only exceptions in Superior Court will be considered see Appeal and Error F a 1; power of one Superior Court judge to pass upon judgment of another see Judges A a).

A Superior Courts.

c Jurisdiction Upon Appeal from Orders of Clerk

1. The Superior Court has the power and authority to determine on appeal the order of the clerk of the court in refusing a motion under C. S., 510, to strike out the defendant's answer on the ground that it was sham and frivolous. C. S., 536. *Wellons v. Lassiter*, 474.

2. Upon appeal from order removing administrators and appointing others, Superior Court may retain cause in its discretion. *In re Estate of Wright*, 630.

d Equity Jurisdiction

1. Our Constitution provided one form of action for the enforcement or protection of private rights or the redress of private wrongs (Art. IV, sec. 1), and such suits theretofore pending were transferred to the courts acquiring jurisdiction without prejudice (Art. IV, sec. 20), and hence the Superior Courts have equitable jurisdiction of all equitable powers when not restrained by statute. *In re Estate of Smith*, 272.

COURTS A d—*Continued.*

2. The Superior Courts in their equity jurisdiction have the power to order debts contracted by a lunatic before his adjudication of lunacy to be paid out of the funds in the hands of the guardian when there are funds available after provision has been made out of the estate for the maintenance of the lunatic and the dependents of his family. *Read v. Turner*, 773.

COVENANTS—Restrictive covenants see Deeds and Conveyances C g; conditions and covenants see Deeds and Conveyances C f).

CRIMINAL LAW (Indictment see Indictment).

C Parties and Offenses.

a Principals

1. One who is present and by his presence and conduct aids, abets or encourages another in committing a crime is a principal in the second degree and is equally guilty with the perpetrator, there being no practical difference between principals in the first and second degree, and the law relating to accessories before and after the fact has no application. *S. v. Allison*, 190.

2. Evidence that the defendant drove the perpetrator of the crime in his car passed the deceased with whom they had both quarreled, and that the perpetrator shot and killed the deceased, and that the defendant and the perpetrator had acted in concert and that both were armed with pistols, and that defendant, as they left the scene of the homicide was heard to remark "we killed a man and must get away from here": is *held* sufficient to sustain a conviction of the defendant as a principal in the second degree. *Ibid.*

F Former Jeopardy.

a When Plea Must be Made

1. Where the trial judge has in the exercise of his sound discretion withdrawn a juror and ordered a mistrial in a criminal action, charging robbery and conspiracy, after allowing the motion of the solicitor to cure an error in the indictment by giving the true name of a defendant, this defendant is not placed in jeopardy a second time for the same offense when she has made the appropriate motion without having excepted to the order of mistrial before the jury had been empaneled to try the action under the second or corrected indictment, and her motion is properly disallowed. *S. v. Ellis*, 77.

G Evidence (In prosecutions for particular crimes see Particular Titles of Crimes; evidence before grand jury see Indictment C c).

c Character Evidence

1. A character witness may not be asked on cross-examination whether he would commit the offense charged against the defendant. *S. v. Nelson*, 69.

f Admissions

1. Where the defendant charged with an assault with a deadly weapon has stated to the officer arresting him that he was at his home the night the offense was committed, and his wife, then in his presence and hearing, states to the officer that he was away from home that

CRIMINAL LAW G f—*Continued.*

night until a much later hour, the statement of the wife was under circumstances calling for his denial, and his failure to do so was competent evidence of his admission for the jury to consider, its weight and credibility being for them to determine. *S. v. Portee,* 142.

2. Testimony by a witness of a conversation between the two prisoners charged with murder is competent against the one whose conversation admitted certain facts tending to implicate him in the commission of the crime as being of an admission by him. *S. v. Herring,* 306.

3. Where the prisoner is on trial for murder alleged to have been committed by him and another, testimony of a conversation between them in which he consistently denied the accusations of the other as to the commission of the crime, and containing no admission of any fact tending to implicate him therein, is incompetent, the conversation not containing any material admission by the defendant. *S. v. Herring,* 308.

i Expert and Opinion Testimony

1. It is competent for a physician who has qualified as an expert, and who has attended the prosecuting witness in a prosecution for assault and battery, to testify from his own observation as to the mental incapacity of the prosecuting witness to have his evidence taken by deposition at one time and later when the depositions were taken that the witness' mind was sufficiently clear. *S. v. Burno,* 267.

2. The qualification of a witness to testify as an expert in finger prints is a preliminary matter for the court, and his finding that a witness is an expert is not reviewable on appeal when there is evidence to support his finding. *S. v. Combs,* 671.

3. It is competent for a witness who has qualified as an expert in finger prints to testify that finger prints found on a bottle at the place of the crime were identical with the finger prints taken of the defendant, the probative force of such testimony being for the jury. *Ibid.*

4. Where the identity of the defendant is at issue on a trial for murder as the one who entered a store and shot and killed the deceased while attempting to rob a cash drawer, evidence of the State's witness that she saw him shoot the fatal shot and that he had a beard of several days growth, who later hesitated in again identifying him upon seeing him shaved, and of another witness, the officer who made the arrest an hour or so later, that he then appeared as one who had hastily shaved with cold water, is competent as a short-hand statement of a collective fact, and not objectionable as inexpert opinion evidence. *S. v. Sterling,* 18.

l Confessions

1. When the confession of one accused of murder is sought to be introduced upon the trial the question as to whether the alleged confession was entirely voluntary and given without inducement by fear or favor should be submitted to the trial court upon a *voir dire* for the purpose of determining its admissibility. *S. v. McRae,* 149.

CRIMINAL LAW G 1—*Continued.*

2. Where it is shown on *voir dire* that the confession of the defendant was made without fear or favor and was voluntary, the confession is properly admitted in evidence and where material facts related in a confession are substantiated and corroborated by other testimony, the confession is admissible as evidence to be considered by the jury. *Ibid.*

3. The fact that a confession of the defendant is incompetent because not voluntarily given does not render certain incriminating evidence discovered by reason of the confession incompetent, and such evidence is admissible when otherwise competent. *S. v. Herring,* 306.

m Weight and Sufficiency

1. Evidence only that defendant was on friendly terms with a young woman in whose possession stolen property was found is insufficient to convict him of housebreaking, larceny, or receiving stolen goods of which he is charged in the bill of indictment, and nonsuit should have been entered. *S. v. Fain,* 87.

2. Where there is positive evidence that the defendant under indictment for an assault actually committed the offense it is not indispensable to a conviction that motive be shown. *S. v. Burno,* 267.

q Privileged Communications and Testimony by Husband or Wife

1. Where the unanswered statement of the wife tending to show the guilt of the husband of a criminal offense is competent as evidence against him, the statute excluding testimony of communications between husband and wife has no application. *S. v. Portee,* 142.

2. The fact that the wife in the presence of her husband related to the officers having him in charge certain matters tending to fix him with the crime of murder with which he was charged, leading him to confess his guilt, does not fall within that class of evidence against him which the statute forbids a wife from giving. *S. v. McRae,* 149.

r Impeaching, Contradicting, or Corroborating Witness, and Character Evidence for Purpose of Substantiating Testimony

1. While cross-examination of a witness is very broad in its scope it will not be allowed to call for the opinion of a character witness upon the matter included in the determination of a controversy, as in this prosecution for false pretense, after the witness had only testified to the general character of the defendant charged with procuring a second note for the company for which he was an officer for the same debt and wrongfully using them both, a question being asked on cross-examination if the witness would do the same thing is not for the purpose of impeaching him, but to place before the jury the witnesses' opinion upon the charge against the defendant laid in the indictment. *S. v. Nelson,* 69.

2. A character witness must be first qualified by an affirmative answer to the question as to whether he knows the general reputation of the witness concerning whose character he is called upon to testify, and then he may of his own volition and without suggestion from the counsel offering him, amplify his testimony by saying his character was good for certain virtues or bad for certain vices. *S. v. Hicks,* 539.

CRIMINAL LAW—*Continued.*

I Trial of Criminal Actions (Particular crimes see Particular Titles of Crimes).

f Consolidation of Actions

1. When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. C. S., 4622. *S. v. Combs*, 671.

g Instructions

1. Where evidence of the unlawful possession of intoxicating liquor by the defendant on trial for violating our prohibition law is uncontradicted and sufficient for conviction, and the defendant offers no evidence, a charge of the judge to the jury to convict the defendant if they found the defendant guilty beyond a reasonable doubt is correct, and in the instant case the refusal to comply with the unwritten request to charge upon the presumption of innocence, made at the conclusion of the charge, and the refusal to state defendant's contention, is held not to be prejudicial error entitling the defendant to a new trial, C. S., 565, 566, the charge being in substantial compliance with C. S., 564. *S. v. Rose*, 342.

2. The failure of the trial court in his charge to the jury to define the term "satisfied beyond a reasonable doubt," and to charge as to the presumption of innocence will be considered as a failure to charge as to subordinate elaboration, and will not be held for reversible error, in the absence of a special request by the defendant. *S. v. Steadman*, 768.

j Nonsuit in Criminal Cases

1. Upon motion as of nonsuit in a criminal action the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. C. S., 4643. *S. v. Marion*, 715.

J Arrest of Judgment, New Trial and Motions.

c Power of Court to Order Mistrial in Discretion

1. On trial for felony not a capital offense the trial court may withdraw a juror and order a mistrial in his discretion. *S. v. Ellis*, 77.

L Appeal in Criminal Cases.

b Appeals in Forma Pauperis

1. In order that the Supreme Court may have jurisdiction of an appeal *in forma pauperis* in a criminal action it is required that the application for leave to appeal be supported by an affidavit of the appellant showing that he is wholly unable to give the security

CRIMINAL LAW L h—*Continued.*

required by C. S., 4650; that he is advised by counsel that he has reasonable cause for appeal, and that the application is made in good faith, and where any of these three statutory requirements have not been complied with the appeal will be dismissed. C. S., 4651. *S. v. Marion*, 715.

2. Where it appears from the record on appeal in a criminal case that the affidavit of the appellant supporting his application to the trial judge for leave to appeal *in forma pauperis* failed to allege that the application was made in good faith, but it is made to appear that the defect has been cured by amendment, the Supreme Court acquires jurisdiction to hear and determine the appeal. *Ibid.*

d Record

1. The record on appeal will control as to whether the proper exception has been duly taken on the question of the plea of former jeopardy relied on in this case. *S. v. Ellis*, 77.

e Review (Motions for new trial in trial court see Criminal Law J c)

1. Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with C. S., 564. *S. v. Sterling*, 18.

2. The weight and credibility of conflicting evidence is for the jury, and where in a criminal action the exclusion of certain testimony of a character witness is error and prejudicial to the defendant, the Supreme Court on appeal will not say that its exclusion was harmless for the reason that the evidence of defendant's guilt was overwhelming, and the appealing defendant is entitled to a new trial. *S. v. Hicks*, 539.

3. Inadvertence in empaneling jury held not to constitute prejudicial error. *S. v. Combs*, 671.

4. Finding that witness is expert is conclusive when there is evidence supporting such finding. *Ibid.*

5. Where the identity of the defendant in a criminal action as the one who committed the offense is in question, and a witness has testified to the identity of the defendant to the best of his knowledge, and the State has introduced an affidavit of the witness positively identifying the defendant, and the judge instructs the jury not to regard the affidavit as substantive evidence, but merely corroborative evidence if they found that it was corroborative: *Held*, the admission of the affidavit in evidence, if error, was not prejudicial. *S. v. Steadman*, 768.

CROPS—Right of purchaser at foreclosure sale to, see Mortgages H m 1, 2.

CUSTOMS AND USAGES see Master and Servant E b 6.

DAMAGES (For breach of lease contract see Landlord and Tenant G b).

F Measure of Damages (In action for damages for pollution of stream see Municipal Corporations E d 2, 5, 6).

c Injuries to Person or Property

1. In this action to recover damages caused by the pollution of a stream by the defendant the action of the trial court in refusing

DAMAGES F c—*Continued.*

defendant's request to limit the recovery to nominal damages is held in accord with the decision in *Finger v. Spinning Co.*, 190 N. C., 74, and cases cited. *Little v. Furniture Co.*, 731.

DEADLY WEAPON—Assault with, see Assault and Battery B c; presumption from use of see Homicide G b.

DEATH.

B Actions for Wrongful Death.

a Limitation

1. Action against individual defendant held barred by lapse of one year, the individual not being a party to prior action nonsuited. *Davis v. R. R.*, 345.

DEDICATION.

A Nature and Requisites.

b Offer and Acceptance

1. Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees therein and the public have the right to the use of the same, and it is in effect an offer of dedication to the public, which, in order to make it binding upon the offerer, requires acceptance in some recognized legal manner by the municipality before the offer to so dedicate has been withdrawn. *Gault v. Lake Waccamaw*, 593; *Wright v. Lake Waccamaw*, 616.

DEEDS AND CONVEYANCES (Estoppel by deed see Estoppel A).

C Construction and Operation.

c Estates and Interests Created

1. A conveyance of land to the trustees of a church organization and their successors, with *habendum* to have and hold to the use of the said church provided and upon condition that the church or congregation continue in communion with the national organization and remain subject to its authority and general control of its general assembly, it appearing that the local organization and its successors had continued in the required communion with the national organization, etc.: *Held*, the provisions in the *habendum* will not ordinarily be construed as qualifying the fee or as a condition subsequent that would defeat the fee, there being no provision giving the grantors the right to reënter upon condition broken, nor any language showing an intent that the property should revert to the grantor. *Church v. Refining Co.*, 469.

2. A deed to lands by a husband to his wife during her lifetime and at her death to the heirs of her body begotten by him, and in the event no heirs are born to them the land to revert to the grantor: *Held*, upon the birth of a child to them the limitation over is defeated, and the estate vests in the wife in fee tail special, which is converted into a fee simple by C. S., 1734. *Morehead v. Montague*, 497.

DEEDS AND CONVEYANCES C c—*Continued.*

3. Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in *Shelley's case*, converted into a fee simple absolute by our statute. C. S., 1734. *Ibid.*

f Conditions and Covenants

1. Clauses in a conveyance of real property providing for the support and maintenance of a person are usually determined as to their effect by a construction of the entire instrument, one clause may be construed as a personal covenant, another a charge on rents and profits of the land, or another a lien or charge on the land itself. *Marsh v. Marsh*, 746.

2. A husband and wife conveyed their lands to their son to effect a family agreement, the deed providing for the support of the grantors and the payment of a certain sum of money to the grantee's sister as part of the consideration, all parties in interest signed the deed, and it was duly registered, the son failed to comply with the conditions therein imposed on him, and by a subsequently registered mortgage obtained a loan for his separate and personal use: *Held*, the provisions for the support of the parents and sister amounting to an equitable lien on the lands prior to that of the mortgage, the mortgagee taking with notice thereof by reason of the prior registration of the deed. *Ibid.*

g Restrictive Covenants

1. Restrictive covenants in deeds against the use of property for other than residential purposes will not be strictly enforced when the character of the surrounding land has been so substantially changed by the growth of the city as to make the enforcement of the restrictions inequitable and unjust, but in this case *held:* the facts found do not show such substantial change in the character of the neighborhood as to call for the operation of this equitable rule, and the restrictions are enforceable, and the fact that a few of the owners of lots near the plaintiff's property had released their rights to insist upon the observance of the restrictions and that the development was divided into separate subdivisions is insufficient to change this result. *McLeskey v. Heinlein*, 290.

D Boundaries.

e Conflicting Evidence, Issues and Verdict

1. Where in an action to recover damages for breach of warranty of seizin in a deed and fraud in the sale of lands the case is submitted on the issue as to whether defendant agreed to deliver the land within certain boundaries beyond those set out in the deed, and as to whether the description in the deed was due to mutual mistake, an affirmative answer to the first issue and a negative answer to the second are conflicting and do not establish facts sufficient for the court to proceed to judgment, and on appeal by defendant from judgment in plaintiff's favor awarding damages, a new trial will be ordered. *Plotkin v. Bond Co.*, 590.

DESCENT AND DISTRIBUTION.

B Persons Entitled to Distribution and Their Respective Shares.

e Husband or Wife

1. The provisions of C. S., 2522, denying to the husband or wife "convicted" of the killing of the other the right in the personal property of the other does not require a conviction of the offense where it is admitted that the homicide had been committed. *Parker v. Potter*, 348.

DIVORCE—Effect of on estate by entirety see Husband and Wife G a 1.

ELECTIONS.

F Absentee Voters.

a Jurats

1. In an action in the nature of *quo warranto* proceedings to test the right of the defendant to hold a municipal office of a city on the ground that ballots of absentee voters were cast for the encumbent that should have been excluded for the reason that contrary to the jurat on the ballots the voters thereof had not in fact been sworn, the jurat is but prima facie evidence that the ballots had been sworn to by the respective voters, which may be rebutted by parol evidence, in this case by the testimony of those who had cast them. C. S., 5960, *et seq. Bouldin v. Davis*, 24.

ELECTRICITY (Damages for change of highway by hydro-electric company see Highways D d).

A Duties and Liabilities of Power Companies.

a Care Required in Regard to Electricity in General

1. The degree of care required of a person in any instance varies according to the facts and circumstances under the uniform rule of that degree of care which an ordinarily prudent man would exercise under like conditions, and the degree of care required of those furnishing electricity for hire is that degree of care which is commensurate with the dangerous quality of the force, and comes within the rule of that care which reasonably should be exercised by an ordinarily prudent man. *Small v. Utilities Co.*, 719.

c Repair, Inspection and Maintenance

1. In this action damages were sought of an electrical power company furnishing electricity for hire, the evidence tended to show that, in temporarily disconnecting plaintiff's service at his request, the power company was negligent in leaving the wires after removing the meter, which resulted in the destruction of plaintiff's house by fire, and also evidence in behalf of the defendant that it was not negligent: *Held*, the issue was properly submitted to the jury. *Small v. Utilities Co.*, 719.

EMINENT DOMAIN (Change of highway by power company see Highways D d; depreciation resulting from sewer system is taking to extent of damage see Municipal Corporations E d 1.

A Nature and Extent of Power.

a Public Use

1. The question of whether the purpose for which private property is taken is a public one is judicial, but the question of necessity and

EMINENT DOMAIN A a—*Continued.*

proper extent of the taking is legislative and subject to determination by such agency and in such way as the Legislature may designate. *Highway Commission v. Young*, 603.

C Compensation.

a Necessity and Sufficiency in General

1. The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infraction of the due-process clause of the Federal Constitution and does not deprive an owner of notice and opportunity to be heard, and where the Commission has instituted a suit to enjoin the maintenance of an obstruction on the right of way of a State highway the owner may not set up therein that the lands had not been condemned and compensation paid, there being nothing in the record indicating a purpose to deprive the owner of notice with respect to assessment of damages. *Highway Commission v. Young*, 603.

D Proceedings to Take Property and Assess Compensation (Charter provisions limiting time for bringing action for compensation see Municipal Corporations J b 1).

a Pleadings, Jurisdiction and Procedure in General

1. In order for a municipality to establish a street or highway by condemnation it is required that condemnation proceedings be instituted by the properly constituted authorities in a proceeding regularly instituted before the proper tribunal, and an official map adopted showing "streets, parks and commons" platted thereon is not sufficient. *Wright v. Lake Waccamaw*, 616.

EMPLOYER AND EMPLOYEE see Master and Servant.

EQUITY—Equitable estoppel see Estoppel C; equitable jurisdiction of Superior Courts see Courts B a; trusts see Trusts; equitable conversion does not apply to exempt property from taxation see Taxation B d 2.

ESTATES—Life estates see Life Estates; estates created by will see Wills E; created by deeds see Deeds and Conveyances C b; by entirety see Husband and Wife G a.

ESTOPPEL (By judgment see Judgments L).

A By Deed.

a Creation and Operation in General

1. Where under a devise of lands the first taker acquires a fee simple subject to be defeated upon the happening of a certain event, a quit-claim deed from the ulterior remaindermen to him, although the deed may not contain technical covenants of title, will estop the grantors from denying that the grantee became seized of the estate the deed purported to convey. *Williams v. R. R.*, 771.

C Equitable Estoppel.

b Acts and Conduct Operating to Estop Party

1. Where the seller has accepted a chattel mortgage or conditional sales agreement he may not maintain that the sale was void for the

ESTOPPEL C b—*Continued.*

failure of the purchaser to comply with the original terms of the contract providing for a cash payment on delivery. *Vanderwal v. Dairy Co.*, 314.

2. Where in an action to enforce a resulting trust the heirs of the first wife of the trustee claim adversely to the interest of the second wife who has loaned her husband money, and there is no evidence tending to show that the second wife loaned the money by virtue of any representations as to the ownership of the land sought to be impressed with the trust: *Held*, the plea of estoppel as against the heirs not participating in the wrongful act rests exclusively on the theory that they stood by in silence, and evidence of estoppel in this case is insufficient to warrant a submission of the issue to the jury. *Miller v. Miller*, 458.

3. Where a husband, in possession of stock in a corporation as administrator of his deceased wife, transfers the stock to the corporation as consideration for a deed to lands from the corporation, and his son, an heir of the deceased wife and an officer of the corporation, signs the deed as such officer and acquiesces in the enjoyment of the property by the husband: *Held*, in an action by the heirs of the deceased wife to impress the property with a resulting trust in their favor, the son is estopped from setting up his interest, he having actually participated in the breach of trust by the husband. *Ibid.*

4. A bank having knowingly received and retained before its insolvency the adequate consideration of a contract made by its president in its behalf, is estopped to deny the authority of the president to bind it thereto, and where the contract obligates the bank to return certain notes upon which the plaintiff is either maker or endorser, and the consideration remains a part of the assets of the bank in the hands of the Corporation Commission or its successor, the Corporation Commission or its successor is also estopped to deny the terms of the contract and are bound thereby, and must return the notes in accordance therewith. *Arbogast v. Corporation Commission*, 793.

D Actions.

b Pleadings

1. As a general rule waiver of estoppel must be pleaded, but in this case *held:* the pleadings were not too indefinite to warrant a submission of the issue to the jury. *Laughinghouse v. Insurance Co.*, 434.

EVIDENCE (Reception of evidence see Trial B; evidence in criminal cases see Criminal Law G; in prosecutions for homicide see Homicide G; in actions against master see Master and Servant C; against railroads see Railroads D; in caveat proceedings see Wills D h; evidence admissible in particular actions see Particular Titles of Actions).

A Judicial Notice.

b Laws of Another State

1. Judicial notice will not be taken of the laws of another State. *Howard v. Howard*, 574.

EVIDENCE—*Continued.*

C Burden of Proof (In caveat proceedings see Wills D c; in action to set aside conveyances see Fraudulent Conveyances C d; of proving fraud see Fraud C d 1; of proving modification of contract see Contracts F c 1; of proving mental incapacity to sign release see Torts C c 1).

a General Rules

1. Where in an action against a father for the negligent driving of his automobile by his minor son the court charges the jury that where the plaintiff has introduced evidence that the son habitually and customarily used the car with his father's consent, that the burden was upon the father to show that on the particular occasion in suit the son was driving without his consent, is not error, the instruction in effect placing the burden of going forward with the evidence on the defendant after the plaintiff, upon whom was the burden of proof, had made out a prima facie case. *Grier v. Woodside*, 759.

b Defenses

1. The burden of proving contributory negligence is on the defendant. *Murphy v. Coach Co.*, 92.

d Counterclaims

1. In an action upon a purchase-money note a counterclaim based upon damages for breach of warranty of the thing sold is a cross-action with the burden of proof on the defendant setting it up. *Gin Co. v. Wise*, 409.

D Relevancy, Materiality and Competency in General.

b Transactions or Communications with Decedent or Lunatic

1. An administrator of a deceased person "opens the door" to the plaintiff in an action against the estate to introduce evidence of personal transactions and communications by eliciting such evidence beforehand on the trial. *Lewis v. Mitchell*, 652.

2. Testimony of declarations of a decedent as to certain of his desires in regard to the distribution of his property, relevant to the issue, is competent when testified to by witnesses not interested in the result of the trial when such testimony is otherwise competent. *Ibid.*

c Facts in Issue and Relevant to Issues

1. Where a discharge in bankruptcy is a bar to the liability of a maker of a note, parol evidence offered as an estoppel to the plea of discharge is incompetent when the pleadings do not raise the issue of such estoppel. *Johnson v. Fountain*, 389.

f Impeaching, Contradicting or Corroborating Witness

1. Where a wife seeking to engraft a resulting trust on certain lands has competently testified that the purchase price was paid by her out of her separate estate, testimony of a disinterested witness to this effect is competent in corroboration of her testimony. *Wise v. Raynor*, 567.

2. Where upon a direct examination of a witness questions are asked tending to impeach the defendant for neglect of her husband, ques-

EVIDENCE D f—*Continued.*

tions asked on cross-examination to show that the defendant performed her duty to him are competent or at least not harmful. *Ibid.*

3. Corroborative evidence must be of evidence already introduced at the trial to be admissible on that ground. *Indemnity Co. v. Perry*, 765.

h Similar Facts or Transactions

1. In an action to recover damages caused by an accident at a dangerous place in a city street where the street was under construction it is competent to show that other accidents had occurred at the same place, the record disclosing that the conditions had remained unchanged. *Pickett v. R. R.*, 750.

i Acts and Declarations of Codefendants and Joint Tort-feasors

1. In an action to recover damages against joint *tort-feasors* for an injury alleged to have resulted from the acts of each forming a connected continuous sequence proximately resulting in the injury in suit, evidence as to the acts of each are competent against the other. *Hamilton v. R. R.*, 543.

2. Where two railroad companies employ a mechanic to repair "bad order cars" on a connecting track maintained by them jointly under a contract fixing a joint liability for negligent injuries to employees working thereon and paid by them both, and both are sued as joint *tort-feasors* for an injury to an employee while repairing a car thereon, the admission in evidence of the contract is at least harmless with other evidence tending to show that the injury was the result of their joint negligence as proximate causes of the injury in suit. *Ibid.*

j Photographs, Plots, Maps and Other Papers for Illustration of Testimony (X-ray photographs see hereunder K b 2).

1. In an action for damages for an injury alleged to have been caused by defective dinky cars furnished by the defendant, photographs of the cars taken several months after the injury, but testified to be substantially in the same condition as those causing the injury, are properly admitted in evidence for the purpose of the witnesses illustrating their testimony. *Kelly v. Granite Co.*, 326.

I Documentary Evidence.

a Statutes and Decisions of Another State

1. The law of another State may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other State, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. C. S., 1749. *Howard v. Howard*, 574.

b Accounts, Records, Ledgers, and Private Writings

1. In an action by the administrator of the deceased father against the son for the accounting by the latter of an advancement alleged to have been made, a bank ledger sheet identified as the original and

EVIDENCE I b—*Continued.*

testified by the cashier as to a relevant entry made in the ordinary course of business of the bank and produced from the bank files at the trial, is competent. *Edgerton v. Perkins*, 650.

J Parol or Extrinsic Evidence Affecting Writings (Affecting liabilities on note see Bills and Notes D b).

a Admissibility in General

1. One who claims under a written contract, though not a party thereto, is bound by its terms, and may not introduce parol evidence contradicting the provisions of the written instrument. *Goldman & Co. v. Crank*, 384.

b Admissibility to Establish Resulting Trust

1. Parol evidence tending to establish resulting trust is admissible in evidence. *Wise v. Raynor*, 567.

c Admissibility to Establish Usury

1. Parol evidence is admissible to show usury although note on its face purports to carry only legal rate. *Pugh v. Scarboro*, 59.

K Expert and Opinion Evidence (In criminal cases see Criminal Law G i).

a Conclusions and Opinions of Experts in General

1. Where injury is shown by the purchaser of a bottled beverage caused by harmful substances found within the bottled drink, the opinion of a witness that foreign substances could not have escaped into the bottles on account of the character of the machinery used is objectionable as invading the province of the jury. *Broom v. Bottling Co.*, 55.

2. Expert testimony that claimant's disease would not result in total disability held not conclusive. *Bullock v. Insurance Co.*, 642.

3. Where evidence supports finding that witness is expert the finding is conclusive on appeal. *Nance v. Fertilizer Co.*, 702.

b Subjects of Expert Testimony

1. In an action to recover damages in a negligent personal injury case wherein the plaintiff signed a release and the controlling question is whether he at the time of his signing had sufficient mental capacity to be bound thereby, witnesses from their own observation may testify as to the plaintiff's mental condition both before and after the time of his signing, as evidence of his mental incapacity when he signed the release in question. *Mangum v. Brown*, 296.

2. *Held*, under the facts of this case against two joint *tort-feasors* to recover damages for an alleged personal injury negligently inflicted, the admission in evidence of an X-ray photograph for the purpose of corroborating a witness, if error, was not prejudicial. *Hamilton v. R. R.*, 543.

L Evidence and Records of Former Trial or in Other Proceedings.

a Competency in General

1. In an action to recover the purchase price of a shingle mill alleged to have been sold and delivered to the defendant who assumed an existing mortgage thereon as a part of its purchase price, defendant

EVIDENCE L a—*Continued.*

denied liability on the ground of plaintiff's breach of a condition precedent. The jury having found against the defendant, it is *held:* the exclusion from the evidence of a judgment against the plaintiff for the amount of the mortgage debt was not erroneous, the defendant having admitted the amount of the debt in the event of an adverse verdict. *Sparrow v. Folley,* 212.

N Weight and Sufficiency (Evidence on nonsuit see Trial D a; sufficiency in criminal actions see Criminal Law G m).

b Sufficiency in General

1. Where there is more than a scintilla of evidence to support the plaintiff's allegations the case must be submitted to the jury and defendant's motion as of nonsuit will be denied, the effect of the motion being that of a motion to dismiss. *Mangum v. Brown,* 296.

EXECUTION.

E Stay, Quashing, Vacating, and Relief Against Wrongful Execution.

a Right to Stay Proceedings

1. The Superior Court rendering a judgment will not grant the remedy of withdrawing or staying its execution issued thereunder against an innocent purchaser at the execution sale or one who is not a party to the proceedings. *Scott Register Co. v. Holton,* 478.

b Procedure to Stay Proceedings

1. Where execution against the property of a defendant is issued under a judgment, the court issuing the execution may, in proper instances, withdraw the process itself, or stay it by granting a supersedeas, and where the defendant has not applied for this remedy, but seeks to enjoin the execution issued to another county against his property therein, on motion made by special appearance, the proceedings in the county other than that in which the judgment was rendered will be dismissed. *Scott Register Co. v. Holton,* 478.

EXECUTORS AND ADMINISTRATORS (Resulting trust created by wrongful appropriation by administrator see Trusts A b 1; wills see Wills; contracts to devise see Wills C).

A Appointment, Qualification and Tenure.

c Removal of Executors and Administrators and Appointment of Successors

1. The clerk of the Superior Court in proper instances has statutory jurisdiction over the administration of the estate of decedents, and has the power to appoint administrators or administrators, *c. t. a.,* C. S., 1, 4139, and to remove executors and administrators for cause, C. S., 31, which powers are reviewable on appeal to the judge of the Superior Court of the county. *In re Estate of Wright,* 620.

2. The Constitutional Convention of 1875 omitting the provisions of section 17, Article IV, of the Constitution of 1868, to the effect that the clerks of the Superior Courts shall have jurisdiction as probate judges, relieved the clerks of their exclusive jurisdiction, and upon appeal from an order of the clerk removing certain executors and administrators, *c. t. a.,* and appointing others in their place,

EXECUTORS AND ADMINISTRATORS A e—*Continued.*

the Superior Court judge may, in the exercise of his discretional powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the Superior Court on appeal. C. S., 637. *Ibid.*

C Control and Management of Estate.

a Supervision and Control by Courts

1. Where the personal representatives of the deceased have disagreed as to the administration of the estate and have brought action for advice as to the proper management of the estate which has been consolidated with proceedings involving the removal of certain executors and administrators, *c. t. a.*, the latter may be regarded as if a motion in the civil action, and the exercise of the discretionary power of the judge of the Superior Court acquiring jurisdiction by appeal in appointing a receiver and retaining the entire matter for further orders is not held for error. *In re Estate of Wright*, 620.

b Contracts of Deceased

1. An entire and indivisible contract providing for the employment of the plaintiff as a clerk in a warehouse for a stated period of time at an agreed price is not terminated by the death of the employer, and the employer's estate is liable to the employee for salary accruing thereunder after the employer's death. *Hall v. Trust Co.*, 734.

2. An employee under a contract of employment with the deceased brought action against the estate of the deceased and his personal representatives individually to recover that part of his salary accruing after the death of the deceased: *Held*, evidence of a contract of employment between the personal representatives in their individual capacity and the employee is insufficient to be submitted to the jury, it appearing from the evidence that the personal representatives dealt with the employee in their representative capacity only and that the employee considered that his agreement for the continuance of the work after the death of the employer was made with them as administrators. *Ibid.*

EXPERT TESTIMONY see Evidence K; Criminal Law G i.

FACTORS see Brokers; distinction between factor and servant see Master and Servant D a 2.

FALSE IMPRISONMENT—Distinction between remedies of false imprisonment and malicious prosecution see Actions B c.

"FAMILY CAR" DOCTRINE see Parent and Child A a.

FEDERAL EMPLOYERS LIABILITY ACT see Master and Servant E.

FINGER PRINTS see Criminal Law G i 2, 3.

FOOD.

A Liability of Manufacturer or Seller for Injury to Consumer.

a Foreign and Deleterious Substances

1. In an action to recover damages from a bottling company for injury caused by harmful substances in a bottle of its beverage,

FOOD A a—*Continued.*

evidence tending to show that the company had not been told by its vendees or drivers that deleterious substances had been formerly found in the bottled drinks is properly excluded. *Broom v. Bottling Co.*, 55.

FORMER JEOPARDY see Criminal Law F.

FRAUD (As ground for setting aside foreclosure see Mortgages H p).

C Actions for Fraud.

b Pleadings

1. Where a material furnisher brings action against the owner of a building, the contractor and another material furnisher for damages caused by the procurement of a waiver by the plaintiff material furnisher of his right of lien, the plaintiff alleging that the defendants conspired together to obtain the waiver by fraud: *Held*, the action is not to enforce a lien or to establish the right of the plaintiff to participate in any funds in the hands of the owner, but is an action for damages based upon allegations of fraud and conspiracy in procuring the waiver, and issues thereon tendered by the defendants were proper and should have been submitted to the jury, and the plaintiff would be entitled to recover thereon provided that competent evidence was offered on such issues. *Home Building v. Nash*, 430.

c Evidence

1. In an action by a material furnisher against the owner of a building, the contractor and another material furnisher, to recover damages for fraud and conspiracy in obtaining from the plaintiff a waiver of his right of lien, the fact that the owner and the contractor agreed that the contractor should pay out of the contract price a preëxisting debt owed to the defendant material furnisher, a corporation in which the owner was interested, is not evidence of fraud in obtaining the waiver, the plaintiff having no right in the contract price until notice to the owner, nor is the fact that, some time after the plaintiff signed the waiver, the contractor failed to disclose the agreement evidence of fraud as to him in obtaining the waiver and therefore is not evidence of such as against his alleged coconspirators. *Home Building v. Nash*, 430.

d Burden of Proof

1. Where the maker of a note admits her signature thereto and resists payment thereof on the ground of fraud in the procurement of her signature, she is required to establish the alleged fraud by the preponderance of the evidence. *Mewborn v. Smith*, 532.

FRAUDS, STATUTE OF.

E Application of Statute in General.

a Signature of Party to be Bound

1. The minutes of a meeting of the board of directors of a corporation voting in favor of indemnifying its secretary against loss in assuming a corporate indebtedness, signed only by the secretary in his official capacity is not a sufficient writing to prevent the operation of the statute of frauds, it being necessary that the

FRAUDS, STATUTE OF, E a—*Continued.*

writing be signed by the party to be bound or by his authorized agent, and the payee of the note evidencing the indebtedness cannot hold them personally liable. *Bank v. Courtway*, 522.

FRAUDULENT CONVEYANCES (Assignment for benefit of creditors see Assignment for Benefit of Creditors; change of beneficiary is not fraudulent as to creditors see Insurance N a 3, 4).

C Actions to Set Aside Conveyance.

d Burden of Proof

1. The burden of proof is upon the plaintiff in his action to set aside as void against creditors a deed made by the wife to the husband or a judgment confessed by her in his favor, and a judgment in plaintiff's favor upon the pleadings is erroneous. *Bank v. McCullers*, 591.

GRAND JURY—Evidence before, see Indictment C c.

GUARDIAN AND WARD.

C Custody and Care of Ward's Estate.

b Control and Management

1. Where a bank is authorized by its charter to act as guardian it owes the same duty to its ward as an individual would owe to keep the ward's funds separate from other funds of the guardian, and to invest the same as the law applicable to investment requires, and where funds of the ward are accepted by the bank in its banking department and commingled by it with its general deposit funds it violates its fiduciary duties as guardian and is liable to the ward for loss occasioned thereby. *Roebuck v. Surety Co.*, 196.

H Liabilities on Bonds.

a In General

1. A surety corporation allowed by statute to give guardian bonds, C. S., 339, is held to the same liability on a bond given by it as an individual would be, and is responsible to the ward when the guardian's failure to properly perform his duties causes loss to the ward's estate. *Roebuck v. Surety Co.*, 196.

b For Mismanagement or Breach of Duty by Guardian

1. A bank authorized by its charter to also act as guardian breaches its duty when it commingles its ward's funds with those of its general depositors, and, where after such wrongful act the bank fails, the surety on the guardian's bond is liable for the loss occasioned thereby to the ward's estate. C. S., 2161, 2162. *Roebuck v. Surety Co.*, 196.

HABEAS CORPUS.

D Review of Proceedings.

a Right to Review, Procedure, and Jurisdiction

1. Review of *habeas corpus* proceedings is by *certiorari*, and upon granting of petition therefor Supreme Court has jurisdiction to review judgment for errors of law. *In re Hayes*, 133.

HIGHWAYS.

A State Highway Commission (Bonds of contractors constructing State highway see Principal and Surety B b 1; city not released from liability for defect in street being constructed by Highway Commission see Municipal Corporations E c 5).

a *Power in Regard to Width of Highway, Surface, Maintenance and signs*

1. The State Highway Commission, under the authority of statute, may establish the width of the State's highways as extending thirty feet each way from the center of the road, and where it has posted signs along a highway at intervals approximating two miles prescribing such right of way, private owners of land along the route, though the State may not have acquired by condemnation or otherwise the full width so established, may not upon such unacquired lands included in the width of the sixty-foot highway create or maintain obstructions that would be a menace to public travel. *Highway Commission v. Young*, 603.

2. It will be presumed that the discretionary power of the State Highway Commission to allow an encroachment upon the right of way of a highway in proper instances, where its written permission is obtained, will be justly exercised, and unless manifest abuse of this discretionary power is shown, the courts will not interfere or declare its ordinance in regard thereto void as giving the Commission power to unjustly discriminate. *Ibid.*

B Use of Highway and Law of the Road.

a *Right Side of Road and Law in Passing Vehicles*

1. The failure to give or observe the signals required by the statute to be given upon the highway by drivers of automobiles desiring to pass other automobiles going in the same direction upon the highway and other requirements for the safety of travel thereon is negligence, and actionable when the proximate cause of injury. *Murphy v. Coach Co.*, 92.

b *Intersections and Speed at Intersections*

1. Where the driver of a motor vehicle in going to his destination must cross a public highway at its intersection with another road, it is required of him that he may cross over with due regard to the safety of others using the highway. *Murphy v. Coach Co.*, 92.

d *Stopping, Starting or Turning*

1. One driving an automobile upon a public highway is required by the common law to use care for the safety of pedestrians and the other drivers of automobiles and vehicles thereon, and by provision of statute to give specific signals before stopping or turning thereon, Michie Code, 2631(59) (a), and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury damages may be recovered therefor by the one injured. *Murphy v. Coach Co.*, 92.

2. The driver of an automobile upon the public highways of the State, before starting or stopping or turning from a direct line is required to first see that such movement can be safely made, and give the statutory signals clearly visible to those who may be

HIGHWAYS B d—*Continued.*

affected thereby, and when a driver of an automobile fails to observe these statutory regulations in coming to a near stop and such failure is the proximate cause of an injury to another endeavoring to pass, it constitutes actionable negligence. *Ibid.*

3. Where there is evidence tending to show that the defendant's autotruck was forced to attempt to cross a bridge over a highway with defendant's passenger bus going in the same direction and that in so doing the plaintiff's truck struck the defendant's bus: *Held*, under the facts of this case an instruction was correct that the defendant's driver of the bus would not be negligent in swerving the bus to one side if such were necessary for his protection and the protection of his passengers. *Ibid.*

e Parking and Lights

1. Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of section 2621 (a) Michie's Code of 1927, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception, section 2621(c): *Held*, under the statute and the facts disclosed by the record the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of nonsuit was error. *Smithwick v. Pine Co.*, 519.

j Sufficiency of Evidence and Nonsuit in Actions for Negligence on Highway

1. Where there is evidence that the plaintiff entered the car of the defendant knowing him to have been drinking, and after he had stated his intention to drive to a nearby city at an excessive rate of speed, and that the defendant attempted to take a curve on a dangerous road at a speed of about seventy miles an hour over the protest of plaintiff, and as a result overturned the car and injured the plaintiff riding therein, there is evidence of wilful and wanton negligence on the part of the defendant, and the evidence is properly submitted to the jury on the issue of negligence, contributory negligence and damages. *Nettles v. Rea*, 44.

2. In an action to recover damages for the alleged negligence of the defendant driving a passenger bus upon a public highway in stopping, or nearly so, and not heeding plaintiff's signal to pass, forcing the plaintiff in so doing onto a side of the road near a bridge across a stream, so that to avoid the stream the plaintiff was forced upon the bridge running alongside of the defendant's bus, which by its negligent driving forced the plaintiff's car through the railing of the bridge into the stream causing the injury complained of, with evidence to the contrary that it was the negligence of the plaintiff in not observing the rules of the road that caused said injury: *Held*, the issues were raised for the determination of the jury as to the defendant's negligence, or the plaintiff's contributory negligence as the proximate cause of the injury, and defendant's motion as of nonsuit made under the provisions of the statute was properly denied. C. S., 567. *Murphy v. Coach Co.*, 92.

HIGHWAYS B—*Continued.*

k Guests and Passengers

1. Although a mere guest in an automobile driven by its owner is not ordinarily responsible for the negligence of the owner, he is required to take due care for his own safety, but in a position of sudden peril he is not required to exercise that degree of care required of him in ordinary circumstances, and the circumstances may be considered by the jury in determining his right to recover. *Smith v. R. R.*, 177.

2. The invitee of the owner and driver of an automobile met his death as the result of a collision of the automobile in which he was riding, with a train at a grade crossing, and upon the trial of the action by his administrator to recover damages for his wrongful death against the railroad company there was evidence to show that the accident resulted from the concurring negligence of the driver and the defendant's employees, and that the intestate saw the danger, but did not warn the driver, the driver perceiving the danger at the same time and doing all that he could under the circumstances to avoid the collision, upon this and other evidence *per contra: Held*, it was for the jury to determine whether the plaintiff's intestate used due care for his own safety upon the question as to whether the intestate was guilty of contributory negligence barring right of his administrator to recover, the burden of showing contributory negligence being on the defendant. *Ibid.*

l Loading, Defects and Condition of Vehicles

1. Where the evidence discloses that the plaintiff, while attempting to pass an unlighted log truck and trailer standing upon the highway at night, collided with a log extending about four feet from the side of the trailer in a cross-wise position, and that the agents and employees of the defendant assisted in loading the truck with knowledge that it was to be operated over a populous highway and that the projections would present imminent menace to travelers: *Held*, the evidence should have been submitted to the jury, although there was no evidence of the relation between the defendant and the driver of the truck. *Brewer v. Moye*, 589.

C County Highways.

a County Highway Officers and Their Powers

1. In construing chapter 235, Public-Local Laws of 1919, chapter 141, Public-Local Laws of 1925, and chapter 167, Public-Local Laws of 1927, it is *held:* the county purchasing agent of Surry County is not authorized to employ a road superintendent upon his sole authority. *Surry County v. Sparger*, 400.

D Obstructing or Changing Highway.

d Damage

1. Where under the provisions of C. S., 1696, a hydro-electric power company has appropriated a section of a public highway and built another section in lieu thereof, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. *Crowell v. Power Co.*, 208.

HOMICIDE (Right of husband to proceeds of policy after felonious killing of wife see Insurance N a 1, 2; Descent and Distribution B e).

B Murder.

a Murder in the First Degree

1. Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, C. S., 4200, under proper instructions from the court thereon upon conflicting evidence. *S. v. Sterling*, 18.

D Assault with Intent to Kill (Assault with deadly weapon see Assault and Battery B c).

a Elements of the Crime

1. In this prosecution for an assault in a secret manner with intent to kill in violation of C. S., 4213: *Held*, the trial court failed to sufficiently explain to the jury the several elements of the offense, and defendant is entitled to a new trial. *S. v. Vanderburg*, 713.

b Evidence

1. Testimony of the prosecuting witness that the defendant was one of several who had beat him, with testimony of an expert witness that the prosecuting witness had sufficient mental capacity, after he had been beaten, to identify his assailants, is held sufficient to be submitted to the jury in a prosecution for assault with intent to kill. *S. v. Burno*, 267.

E Justifiable or Excusable Homicide.

a Self-Defense

1. While ordinarily a homicide is not justifiable upon the plea of self-defense if the accused has reasonable opportunity under the circumstances to retreat and avoid the killing, where the evidence in a prosecution for a homicide tends to show that the deceased had threatened to kill the accused and his wife, and called at their home about midnight, kicked open the door and renewed his threats, and was killed by the accused firing from his home, an instruction applying the ordinary rule is reversible error. *S. v. Bryson*, 50.

G Evidence.

a Weight and Sufficiency

1. While evidence of motive and an opportunity alone may not be sufficient to convict the defendant on trial for a homicide, the question of his guilt should be submitted to the jury where motive and opportunity are shown and his own testimony and declarations are contradictory of the natural evidence appearing at the time and place of the crime, and reasonably bears out the inference that he was endeavoring to fix the crime on some one else, not identified, in order to exculpate himself, and that he was the only person present at the time of its commission. *S. v. Marion*, 715.

b Presumptions and Burden of Proof

1. Where there is evidence sufficient to convict the prisoner of the crime of manslaughter as an aider and abettor of the actual perpetrator, and there is evidence that the killing was done with a deadly

HOMICIDE G b—*Continued.*

weapon: *Held*, an instruction is not erroneous which places the burden of proof on the State to show guilt beyond a reasonable doubt and on the defendant to satisfy them with his evidence of matters in mitigation or excuse. *S. v. Allison*, 190.

HOMESTEAD.

A Nature, Allotment, and Extent.

e Value and Appraisal

1. A homestead exemption may be laid off in an equity of redemption, but when so done it is subject to the lien of the mortgage registered prior to the docketing of the judgment under which the execution is issued, and the mortgage debt should not be taken into consideration in appraising the value of the land for the homestead right. *Chemical Corp. v. Stuart*, 490.

HOSPITALS—Power of city to issue bonds for, see Municipal Corporations K a 2.

HUSBAND AND WIFE (Right of husband to proceeds of policy after feloniously killing wife see Insurance N a 1, 2; Descent and Distribution B e; right of husband to sue wife in tort in cause arising in another State see States A a 6, 7, 10, 11; privileged communications see Criminal Law G q; wife's deed as color of title see Adverse Possession A h; creation of resulting trust from purchase of land with wife's estate see Trusts A b).

G Property.

a Estates by Entirety

1. The effect of an absolute divorce is to sever the title to lands held by the husband and wife in entirety, and they will hold the title as tenants in common. *Potts v. Payne*, 246.

INDEMNITY (Indemnity bonds see Principal and Surety).

A Contracts to Indemnify in General.

a Persons Secured Thereby

1. Where the directors of a corporation vote for and pass a resolution each pledging his individual liability in proportion to the amount of stock he holds in the corporation as security for its secretary in obtaining a loan on his individual note for the benefit of the corporation, the payee of the note cannot enforce the individual liability of the directors upon the ground that he was the beneficiary of the transaction when it appears from the resolution itself and from the interpretation placed thereon by the parties that only the maker of the note was the beneficiary of the resolution in exclusion of the payee. *Bank v. Courtway*, 522.

INDEPENDENT CONTRACTORS see Master and Servant D a.

INDICTMENT.

C Motion to Quash or Dismiss.

c For Insufficient, Incompetent or Illegal Evidence

1. Where in a prosecution of a criminal action the defendant moves to quash the bill of indictment or offers a plea in abatement on the ground that incompetent evidence was considered and that there

INDICTMENT C c—*Continued.*

was no competent evidence heard by the grand jury, in that the finding of a true bill was based exclusively on hearsay evidence of two witnesses: *Held*, the action of the trial judge in refusing to hear the testimony of the witnesses before the grand jury that their testimony before it was hearsay, is not error, the distinction between incompetent evidence and testimony of disqualified witnesses pointed out by ADAMS, J., *S. v. Levy*, 586.

INDUSTRIAL COMMISSION see Master and Servant F.

INJUNCTIONS (Availability of remedy to test right to public position see Actions B b 1; to test validity of zoning ordinance see Municipal Corporations H e; to test validity of tax ordinances see Taxation E b; right to enjoin foreclosure see Mortgages H b)

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying or Dissolving

1. Upon a showing of a basis for injunctive relief equity will ordinarily continue a temporary order to the final hearing where great harm might result from its dissolution and no harm can result from its continuance. *Parker Co. v. Bank*, 442.

INSANE PERSONS (Jurisdiction of clerk over estate of, see Clerks of Court C b; of Superior Courts see Courts A d 2; commitment to asylum raises no presumption of mental incapacity where patient has been discharged see Wills D h 2; insanity as affecting running of statute of limitations see Limitation of Actions C d 1).

D Control and Management of Estate.

b Debts of Estate

1. Where a creditor has obtained judgment against his debtor before the latter's adjudication as a lunatic, and seeks by action in the Superior Court against the guardian to subject moneys available for the payment of such claims to the payment of his judgment, and the guardian makes it to appear that there are other like creditors of the lunatic, and that the funds are insufficient to pay all claims: *Held*, a refusal by the court of the guardian's motion to make other like creditors of the lunatic parties to the suit, is error and the case will be remanded, the judgment creditors being entitled only to prorate in the funds available unless there are priorities by liens or mortgages. *Read v. Turner*, 773.

2. Where judgment creditors of a lunatic seek to subject the funds of the estate in the hands of the guardian to the payment of their debts contracted before the adjudication of lunacy, their remedy is by civil action in the Superior Court and not by petition, and a petition brought by them for this purpose is properly dismissed. *In re Turner*, 779.

INSURANCE (Surety bonds see Principal and Surety; breach of contract to insure see Contracts E a 1).

A Control and Regulation of Insurance Companies.

d Dissolution

1. An incorporated association of lodges doing business in North Carolina providing for payment of death benefits not exceeding five hundred dollars to any one person is not subject to proceedings in

INSURANCE A d—*Continued.*

dissolution under the provisions of C. S., 6524, and a judgment accordingly entered is according to the express provisions of C. S., 6518, and will be upheld on appeal. *Boney v. Odd Fellows*, 331.

E The Contract in General (Arbitration of amount of loss under the provision of policy see Arbitration and Award).

b Construction and Operation in General

1. Where the language of a policy of insurance is ambiguous or susceptible of more than one construction, it should be given that construction favorable to the insured, but where the insurer's liability is limited by unambiguous language, the policy, as a rule, should not be construed to enlarge the liability beyond the plain meaning of its terms. *Johnston v. Casualty Co.*, 763.

c Reformation and Rescission

1. An insurance policy of a fraternal order is subject to reformation by the courts in equity when it is alleged and proved that it failed to express the real agreement of the parties because of mistake common to both parties or mistake of one party induced by the fraud of the other. *Welsh v. Brotherhood of R. R. Trainmen*, 184.

2. Rescission rather than reformation of a policy of insurance of a benevolent or fraternal order will be decreed in proper instances when the result of reformation will result in unjust discrimination among its members. *Ibid.*

3. Where in an action for reformation of an insurance policy of a fraternal order there is evidence that an officer of the order made a misstatement to a member of the order as to the risks covered by the policy, but there is no evidence that the statement was made as an inducement to the member to take out the policy or that the statement was relied on by the member, with further evidence that the member could have read the policy and was given an opportunity to do so, is *held:* insufficient for the reformation of the policy to cover a risk it did not assume to cover. *Ibid.*

H Cancellation and Surrender of Policy.

d Amount Due Upon Cancellation or Surrender of Policy

1. The holder of a life insurance policy who has borrowed money thereon, upon giving notice to the insurer to cancel the policy, is entitled only to receive the difference between the cash surrender value of the policy and the outstanding policy loan, and it is error for the trial judge to direct a verdict in a larger sum. *Batchelor v. Insurance Co.*, 346.

J Forfeiture of Policy for Breach of Covenants and Conditions.

a In General

1. In construing a contract of life insurance the law will avoid a forfeiture for nonpayment of premiums when this can be done by reasonable construction, but a forfeiture will be enforced if plainly incurred by the terms of the policy unless there is an express or implied waiver by the insurer. *Hill v. Insurance Co.*, 115.

2. Where the deceased purchaser of two trucks under a conditional sales contract and his administrator had knowledge of the terms and

INSURANCE J a—*Continued.*

conditions of a policy of fire insurance thereon procured by the seller, and the evidence discloses several breaches of stipulations in the policy by the administrator which, under its terms, would forfeit the policy, and there is no evidence of a waiver of such violations by the insurer: *Held*, in an action by the seller to recover the balance of the purchase price, the cross-action of the administrator against the codefendant insurer for loss sustained by fire is properly nonsuited. *Truck Corp. v. Trust Co.*, 157.

e Encumbrancing Property

1. A seller of an automobile retaining title to secure a note given for the balance of the purchase price assigned the note it secured to another who received from the purchaser a renewal note in a smaller amount extending the time of payment and retaining the original papers as collateral: *Held*, the transaction did not increase the risk of the insurer of the automobile or release it from liability upon the destruction of the automobile by fire, and defendant's motion as of nonsuit upon the evidence of the plaintiff was improvidently allowed. *Laughinghouse v. Insurance Co.*, 434.

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

a Knowledge of Violation of, or Agreements Affecting Policy

1. Where the insured in a life insurance policy has obtained from the general insurance agent, having the authority express or implied, an extension of time for the payment of his premiums as stipulated in his policy, by a cash payment and two renewal notes, one of which he pays when due, and the insurer has received in cash an amount sufficient to pay the pro rata part of the premium until insured's death, which occurs after the due date of the second premium note, and the beneficiary has theretofore agreed with the general agent upon an extension of time for the payment of the second premium note to a date which had not been reached when the insured died: *Held*, the courts will not decree a forfeiture for the default in the payment of the second extension note. *Hill v. Insurance Co.*, 115.

2. In the absence of fraud and collusion between the insured and the local agent of the insurer, knowledge of the local agent will be imputed to the insurer, and where the insurer seeks to escape liability for a fire loss covered by the policy on the ground that other insurance, taken out on the subject-matter of the policy, was in effect and that the policy sued on provided that the insurer would not be liable if the property insured was covered by other insurance, evidence that the agent of the insurer had examined the other policy of insurance and declared that it was void, and had issued the policy sued on with this understanding, is sufficient evidence of waiver of the provision of the policy relating thereto, and the issue as to whether the other insurance was in effect and whether if in effect the insurer had waived the provision in its policy relating thereto, should be submitted to the jury. *Laughinghouse v. Insurance Co.*, 434.

INSURANCE—*Continued.*

N Persons Entitled to Proceeds.

a Upon Death of Insured in Life Policy

1. Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, his heirs may not claim under him the proceeds of the policy since the law will not allow a man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to his heirs at law. C. S., 10, 2522, 137. *Parker v. Potter*, 348.

2. Where a policy of life insurance by its express terms fixes the beneficiary as the mother of the insured in the event of the prior death of the insured's wife, and the insured feloniously kills his wife and then himself, the proceeds of the policy are payable to the insured's mother under the express provisions of the policy contract itself. *Ibid.*

3. A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. C. S., 6464. *Teague v. Insurance Co.*, 450.

4. Where by the terms of a life insurance policy the insured retains the right to change the beneficiary therein by giving written notice to the company and surrendering the policy to it for endorsement, the provision for endorsement by the company is for the benefit of the company and may be waived by it, and where the insured has notified the local agents of the company in writing to change the beneficiary, there remaining only the endorsement by the company to effect the change, but the notification is not received by the company until after the death of the insured: *Held*, the insured has substantially complied with the provisions of the policy relating to the matter, and the change in beneficiary will be given effect. *Ibid.*

R Accident and Health Insurance.

a Accidental Injuries to Insured

1. Where a policy of insurance provides for the payment of a certain sum to the beneficiary named therein in case the insured dies from accidental bodily injuries resulting from "the wrecking or disablement of any . . . private automobile of the pleasure-car type," the language is unambiguous and parol evidence is not admissible to explain the meaning of the words used, and the policy does not cover death from injuries resulting from a wreck of a truck used principally in hauling milk, the word "type" used in the policy implying classification, and the distinction between automobiles and trucks being recognized by the motor vehicle statute of the State, and where the facts are admitted the question of whether death resulted from a risk covered by the policy becomes a proposition of law. *Lloyd v. Insurance Co.*, 722.

INSURANCE R—*Continued.*

c Disability Clauses

1. Where a section of the insurance feature of a benevolent association provides that any holder of its certificate who shall suffer the amputation of one or both hands, one or both feet, or the loss of sight in one or both eyes, or who shall reach the age of seventy shall be considered totally and permanently disabled and be entitled to disability benefits thereunder: *Held*, there is no ambiguity in the language of the section leaving room for construction, and a holder of a certificate may not recover thereunder for disability arising from injury to his spine. *Welsh v. Brotherhood of R. R. Trainmen*, 184.

2. Where the terms of a policy of insurance issued by a fraternal association obligates to pay a certain amount upon the insured being permanently disabled if injury resulted in certain particular instances; and as to permanent injury otherwise resulting, payment was left to the "benevolence" of its specified committee, the policy specifying that in the event that the application for disability benefits under this section be disallowed by the committee that their action would be final and that no appeal should lie therefrom, and that in case of action at law the section could be pleaded in bar of recovery: *Held*, upon the committee disallowing an application under the section the claimant may not recover in an action at law on the ground that the action of the committee was arbitrary and unreasonable. *Ibid.*

3. In order for an insured to recover upon a disability clause in a policy of life insurance requiring that the insured be rendered incapable of following "a gainful occupation" in order to be entitled to payments thereunder, the insured must show more than inability to follow his usual avocation, and must show incapacity to follow any calling for which he is physically and mentally qualified, but ability to do odd jobs of comparatively trifling nature will not preclude recovery, and the question of whether the insured has suffered such total disability is for the jury. *Bullock v. Insurance Co.*, 642.

4. Testimony of experts in an action to recover upon a disability clause in a life insurance policy that the disease with which the plaintiff was suffering would not result in total disability is not conclusive on the question of whether the plaintiff was able to follow a gainful occupation, and where there is evidence in behalf of the plaintiff that he was totally and permanently rendered incapable of engaging in gainful occupation the conflicting evidence is properly submitted to the jury under correct instructions from the court. *Ibid.*

d Liability and Property Damage Insurance

1. The provisions of an automobile liability insurance policy with an "omnibus coverage clause" extending its coverage to employees of the insured while using the cars of the insured and engaged in the performance of its business, does not extend to the use of such cars by an employee for purposes unrelated to or independent of the business of the insured, as in this case the use of the car by the employee after business hours for purposes exclusively his own. *Johnston v. Casualty Co.*, 763.

INTOXICATING LIQUOR.

B Possession.

a Actual and Constructive Possession and Presumptions Therefrom

1. Where the officers arresting the accused for violation of the prohibition law find at the time of the arrest whiskey in sufficient quantities hid under a loose board in his store, the whiskey is in his constructive possession, and the fact is sufficient to raise the presumption that he had it for the purpose of sale. *S. v. Rose*, 342.

JUDGES.

A Rights, Powers and Duties.

a In General

1. A judge of the Superior Court has no authority to review upon matters of law a judgment rendered by another Superior Court judge, the procedure being by exception and appeal to the Supreme Court, and a judgment by one judge of the Superior Court in attempting to review the judgment of another judge will be treated as a nullity, and the former judgment from which no appeal is taken will remain effective. *Wellons v. Lassiter*, 474.

JUDGMENTS (Execution on see Execution; rights should be set up before judgment see Mortgages H m 3; priority of mortgages and judgments against corporation see Corporations G h).

F On Trial of Issues.

b Form and Requisites

1. Where the county board of education orders the removal of school committeemen, C. S., 5458, who appeal under the provisions of C. S., 5427, the judgment of the Superior Court judge holding the act of the board of education in removing the committeemen invalid and dismissing the appeal for want of jurisdiction is inconsistent and erroneous. *Board of Education v. Anderson*, 57.

c Conformity to Verdict or Pleadings

1. When according to the verdict of the jury the plaintiff is entitled to recover damages in a negligent injury case, and the trial court refuses to sign judgment according to the verdict on the ground that as a matter of law the evidence failed to establish the defendant's negligence as a proximate cause of the plaintiff's injury, and signs judgment for the defendant without disturbing the verdict: *Held*, there being a conflict between the verdict and judgment, the judgment will be vacated, the verdict set aside and a new trial ordered on appeal. *Morgan v. Owen*, 34.

d Non Obstante Veredicto

1. A motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, and the defendant's motion was properly overruled upon the authority of *Iron Works v. Beaman*, 199 N. C., 537, and cases cited. *Little v. Furniture Co.*, 731.

e Conditional or Alternative Judgments

1. An order of continuance of the trial of an action providing that upon the performance of certain conditions the action should remain upon the civil issue docket for trial, otherwise the judgment of the clerk appealed from to be affirmed, is not self-executing, and will be declared void. *Flinchum v. Doughton*, 770.

JUDGMENTS—*Continued.*

K Attack and Setting Aside.

b Surprise, Excusable Neglect, etc.

1. Where the trial court finds that the attorneys for the plaintiff and defendant agreed upon a compromise judgment, and that while on his way to effect the agreement on the date counsel had agreed among themselves the case would be called, the attorney for the defendant was delayed by a closed highway, and that when he arrived at the courthouse he found that on the previous day judgment against his client had been taken by default in a much larger sum than the compromise agreed upon: *Held*, the action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties in *statu quo*, will be upheld on appeal, C. S., 600, the record disclosing that the answer of the defendant set up a meritorious defense. *Cagle v. Williamson*, 727.

f Procedure

1. The action of the judge of the Superior Court in passing upon the judgment of the clerk of the court in refusing to strike out the defendant's answer as sham and frivolous, C. S., 510, is upon a matter of law requiring exception thereto and an appeal to the Supreme Court, and does not come within the rules of practice and procedure regulating the remedy from irregular judgments or those contrary to the course and practice of the courts, and C. S., 600, relating to mistake, surprise, or excusable neglect does not apply. *Wellons v. Lassiter*, 474.

2. Where the clerk of the court, after time for filing answer has expired, has allowed the plaintiff to amend his complaint to allege fraud so that an execution against the person of the defendant might be issued in the event of judgment in plaintiff's favor, and the required notice of the motion to be allowed to amend has not been given the defendant, but the amended complaint has been served on the defendant, his failure to file answer or to object to the irregularity until four months after judgment when execution against his person had been issued, is a waiver of the irregularity in the proceedings, and his motion to set aside the judgment as a matter of law will be denied. *Discount Corp. v. Butler*, 709.

L Operation of Judgment as Bar to Subsequent Action.

a Judgments of Nonsuit

1. The plea of estoppel by a former judgment of nonsuit in an action between the same parties will not be sustained if the pleadings and evidence therein are not substantially identical, and on appeal it is not required that the trial judge in denying the plea to set forth the facts showing the difference, it being discretionary with him. *Hill v. Insurance Co.*, 115.

2. Where an action for wrongful death is brought against a corporate and an individual defendant more than one year after the date of the death, but within one year from the date of a voluntary nonsuit in an action brought within the year against the corporate defendant alone, the action is properly nonsuited as to the individual defendant, he not being a party to the first suit nor affected by the nonsuit therein rendered. C. S., 160, 415. *Davis v. R. R.*, 345.

JUDGMENTS L -*Continued.*

b Matters Concluded or Embraced in Pleadings

1. Decree for partition will not bar action relating to title to lands partitioned. *Henderson v. Power Co.*, 443.

c Foreign Judgments

1. The existence of a workmen's compensation act in another state where a citizen of North Carolina has been injured while engaged there, does not exclude him from maintaining in the courts of this State an action for damages for the personal injury resulting from his employer's actionable negligence, it appearing that the cause was never finally adjudicated in the other state. *Lee v. Construction Co.*, 319.

M Conclusiveness of Adjudication (Of decision of Supreme Court see Appeal and Error K c; claims not set up before judgment are barred see Mortgages H m 3).

a Matters Concluded

1. A final decree for partition of lands operates to sever the unity of possession but it does not convey title, and where the devisees under a will have been parties to a special proceeding for partition in which a final decree has been rendered, they are not estopped thereby from maintaining an action against the grantee of one of the devisees to recover the land conveyed. *Henderson v. Power Co.*, 443.

b Persons Concluded

1. Where lands have been devised upon certain limitations, some of which are affected with contingent interest, and the judgment of the court recites all parties and interest were before it, it will be conclusive of any interest embraced by the judgment. *Bell v. Gillam*, 411.

JURY (Inadvertence in empaneling jury held harmless see Criminal Law L e 3).

C Right to Trial by Jury.

a Preservation and Enforcement of Right

1. Where a party to a civil action has preserved his right to a trial by jury by excepting to an order of reference he may waive this right by failing to file exceptions to particular findings of fact by the referee or by failing to tender appropriate issues on the exceptions so made embraced in the pleadings, and by failing to demand a jury trial as to each of these issues. *Cotton Mills v. Maslin*, 328.

b Voluntary Waiver of Right

1. Where claims against an insolvent corporation are filed with its receiver, and the parties waive their right to a trial by jury, and on appeal the cause is remanded for further findings of fact, the receiver, having waived its right, may not successfully insist upon a trial by jury on the second hearing. *Trust Co. v. Transit Lines*, 415.

c In Particular Proceedings

1. Trial by jury is not constitutional right under Workmen's Compensation Act. *Hagler v. Highway Commission*, 733.

JUSTICES OF THE PEACE.

E Review of Proceedings.

b Recordari

1. Where the appellant from the judgment of a justice of the peace has given notice of appeal and paid the justice's fee, together with the clerk's fee for docketing the appeal, but no appeal has been docketed in the Superior Court and no fee received by the clerk nor notice of appeal given him, and application for a writ of *recordari* after the lapse of ten terms of the Superior Court is properly denied. *Teel v. Knott*, 521.

LABORERS' AND MATERIALMEN'S LIENS (Liens of employees of lumber company see Logs and Logging B c).

E Waiver of Lien (Fraud in procuring, see Fraud C b 1, C c 1).

a Effect and Operation

1. The legal effect of a valid waiver of lien, under the circumstances disclosed by the present record, is to remit the plaintiff to his right to participate in any fund in the hands of the owner. *Home Building v. Nash*, 430.

LANDLORD AND TENANT.

B Leases in General (Liabilities of lessor and lessee for injuries to third persons from irrepair see Negligence A c).

a Requisites and Validity

1. Where a church leases a part of its property by a lease contract wherein it warrants that it has the indefeasible fee to the property, and the lessee refuses to accept the instrument on the ground that the title of the church was defeasible in that its deed contained a provision in the *habendum* that the property should remain to its use provided and on condition that it remain in communion with the national organization: *Held*, if the provision in the *habendum* be construed as qualifying the fee or as a condition subsequent, the possibility of the breach by the church is so remote that the condition should be disregarded, and the lease will be upheld, the lessee being protected therein by covenants if the fee of the church should be terminated to the damage of the lessee. *Church v. Refining Co.*, 469.

D Terms for Years.

b Assignment or Subletting

1. Where a lease of real property expressly provides that the lessee, his heirs and assigns might not transfer the leased premises to another without the consent of the lessor, the restrictions do not solely apply to the original lessee, and where there are several and successive assignments of the lease, the consent of the lessor to one of these does not waive his right to withhold his consent to subsequent assignments, the respective lessee taking with notice of the express terms of the lease, and where after a series of such transfers the lessor notifies a lessee that the latter could not transfer the lease to another but upon condition that he remain liable for the rent according to the terms of the original lease, the condition under which the lessee may lease the premises is enforceable by the lessor. *Childs v. Theaters, Inc.*, 333.

LANDLORD AND TENANT—*Continued.*

G Breach of Lease Contract.

b Measure of Damages for Breach

1. In this case *held:* measure of damages for breach of a lease contract were correctly assessed in accordance with *Monger v. Lutterloh,* 195 N. C., 274, and appellant's contention that the damages assessed were excessive cannot be sustained. *Trust Co. v. Transit Lines,* 415.

H Rents (Lien on crops for rent after foreclosure see Mortgages H m 1, 2).

b Rights and Liabilities

1. Where a church, acting through its duly appointed trustees, executes a valid lease of part of its lands the lessee is not required to see to the proper application of the money it pays as rent under the terms of the lease. *Church v. Refining Co.,* 469.

LARCENY.

A Offenses and Responsibility (Sufficiency of evidence of see Criminal Law G m 1).

b Degrees of Crime

1. Under the provisions of chapter 285, Public Laws of 1895, as amended by chapter 118, Public Laws of 1913, the punishment for larceny of goods of less value than twenty dollars is for a misdemeanor, and over that and under certain circumstances is punishable as a felony, the burden being upon the defendant to show a diminution of the sentence, and where he has introduced no evidence and the State's evidence is conflicting, he is entitled to have the value fixed by the verdict of the jury: and *Held,* where this has not been done, a sentence for the commission of a felony is reversible error. *S. v. Talley,* 46.

LAW OF THE FORUM see States A a.

LEASES see Landlord and Tenant.

LEX LOCI CONTRACTU see States A a.

LIBEL AND SLANDER.

B Privileged Communications.

b Qualified Privilege

1. The question of whether slanderous words are privileged is a question of law for the court. *Hartsfield v. Hines,* 356.

2. Where the slanderous words spoken of the plaintiff by the defendant are absolutely privileged, falsity and malice are irrebuttably negatived, but where the words are qualifiedly privileged the plaintiff must prove that they were falsely and maliciously uttered. *Ibid.*

3. Where the president of a corporation, after making investigation of reports of certain alleged misappropriations of its treasurer, summons him to his presence and inferentially charges him therewith in the presence of other officers or employees of the corporation having the duty of keeping the company's records, the accusations of the president are qualifiedly privileged, the president, officers and employees having an interest therein, and the treasurer in his

LIBEL AND SLANDER B b—*Continued.*

action to recover damages for the utterance of the alleged slander must show that the words were spoken falsely and maliciously. *Ibid.*

4. In an action for slander uttered by the defendant as president of a corporation, inferentially charging its treasurer, the plaintiff, with misappropriating the company's property, evidence that the president and the plaintiff had always theretofore been on friendly terms; that the words were spoken in good faith and that the president appeared to be distressed at the time, is sufficient to support the finding of the court that the words spoken were spoken without malice. *Ibid.*

5. Where a police officer has arrested an employee of a corporation having in his possession goods of the corporation that had been misappropriated, words spoken to the officer by the president of the corporation charging that another employee of the corporation had also misappropriated goods of the corporation are qualifiedly privileged, the president of the corporation and the officer having an interest in the matter, it being the duty of the officer to detect criminals. *Ibid.*

6. In an action to recover damages for slander justification and mitigation are comprehended in the defendant's answer alleging truth and privilege, especially when the facts from which the privilege springs are set up by the defendant and appear to be sufficient. C. S., 542. *Ibid.*

LIENS see Mortgages, Chattel Mortgages, Deeds, Taxation, Logs and Logging.

LIFE ESTATES.

C Sale of Estate for Reinvestment.

a Right to Relief and Procedure

1. Under the amendment to C. S., 1744, the right of those having a contingent remainder in lands to have the lands sold for reinvestment is extended to the life tenant, who may do so without the joinder of the vested remaindermen (chapter 124, Public Laws of 1927), and *held:* where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold, the demurrer of the vested remaindermen is improperly sustained, although the life tenant is not entitled to the specific relief prayed for, the complaint alleging at least one good cause of action. *Stepp v. Stepp*, 237.

LIMITATION OF ACTIONS (Adverse possession see Adverse Possession; charter provisions limiting time for bringing action see Municipal Corporations J b; limitation of action for wrongful death see Death B a; for foreclosure of tax sale certificate see Taxation H b 4).

A Statute of Limitations in General.

f Applicability to Defenses

1. Where action is brought on note the defense of usury is not barred by lapse of two years. *Pugh v. Scarboro*, 59.

LIMITATION OF ACTIONS—*Continued.*

B Computation of Period of Limitation.

a Accrual of Right of Action

1. Where a warranty is prospective as to a contract, as in this case, a written guarantee that a heating plant to be installed in a building according to plans and specifications would be free from defects and flaws and capable of heating the building to a temperature of 70 degrees with an external temperature of 10 degrees below zero, the statute of limitations does not begin to run in favor of the contractor from the date of the contract, C. S., 441, as the cause of action will not be deemed to have accrued at that time, and where the evidence is to the effect that the fault had repeatedly been called to the contractor's attention with the latter's ineffectual attempts to remedy it, upon which the owner relied until it was demonstrated that the plant was inadequate and could not be put in shape to comply with the warranty: *Held*, a motion as of nonsuit under the defendant's plea of the statute barring the action in three years from the time of making the contract is properly denied. *Heath v. Furnace Co.*, 377.

2. Where a husband uses the funds of his deceased wife to purchase land, creating a resulting trust in favor of her heirs, the right of action of the heirs accrues at the date of the execution of the deed to the husband purporting to put title in him in his own right, and the heirs of the wife will be barred from bringing action after ten years from the execution of the deed unless the statute is prevented from running by absence or disability. *Miller v. Miller*, 457.

b Demand, Notice, Ignorance, Fraud or Mistake

1. When the wife is in possession of the lands to which title has been conveyed to her and her husband and in which she may establish a resulting trust in her favor, she being the *cestui que trust* in possession, neither the three- nor ten-year statute of limitations will bar her right, there having been no act of disclaimer or act of the husband which would set the statute in motion against her. *Wise v. Raynor*, 567.

d Disability

1. An action is commenced upon the issuance of a summons, C. S., 404, and an action for assault and battery is barred upon the plea of the statute, C. S., 443, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity occasioned by the blow the defendant inflicted upon him, the time of such disability will be deducted from the running of the statute. C. S., 407. *Hayes v. Lancaster*, 293.

e Absence from State

1. Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the State, the elapsed time is less than ten years, the cause of action is not barred by the ten-year statute. C. S., 411. *Miller v. Miller*, 458.

LIMITATION OF ACTIONS B—*Continued.*

g Institution of Action

1. Where certain named individuals, directors of a corporation, are served with summons as trustees, and as to them the plaintiff takes a voluntary nonsuit and moves that the corporation be made the defendant in the action, and the complaint amended, the effect of the motion is to commence a new action against the corporation, and not to amend the original complaint, and the statute of limitations as to the corporate defendant will be computed as to the date of service on it. C. S., 475. *Jones v. Vanstory*, 582.

LOGS AND LOGGING (Application of Federal Employers' Liability Act to logging roads see Master and Servant E a).

B Duties and Liabilities of Lumber Companies to Employees.

c Liens for Labor

1. Under the provision of C. S., 2436, prior to the amendment of 1929, persons who cut and log timber to a mill under a contract to do so at a fixed price are not entitled to a lien for such services in an action wherein it appears that the logs were seized on the premises of a railroad company, this interpretation of C. S., 2436, being strengthened by the fact that the amendment of 1929 included within the meaning of the statute those who were engaged in logging to the mill. *Graves v. Dockery*, 317.

LUNATICS see Insane Persons.

MALICIOUS PROSECUTION.

A Right of Action and Defenses (Distinction between remedies of malicious prosecution and false imprisonment see Actions B c).

b Legal Process

1. Malicious prosecution is one founded upon valid legal process, maintained maliciously and without probable cause, and where the plaintiff in his civil action for damages has been arrested under an invalid warrant he may not maintain an action for malicious prosecution, his remedy being an action for false imprisonment. *Young v. Hardwood Co.*, 310.

c Probable Cause

1. In an action for damages for malicious prosecution the fact that the plaintiff was arrested upon the defendant's affidavit before a justice of the peace, bound over to the Superior Court where a true bill was found, establishes probable cause prima facie, subject to rebuttal, and where he introduces no evidence in rebuttal at the trial, a judgment as of nonsuit is properly entered. *Young v. Hardwood Co.*, 310.

MANDAMUS—Does not lie to cempel superintendent to approve election of teacher see Schools and School Districts G a 1.

MASTER AND SERVANT.

A The Relation (Contract of employment not terminated by death see Executors and Administrators C b).

a Creation and Existence in General

1. The relation of master and servant arises out of contract and contemplates the master's right to prescribe the end and to direct the

MASTER AND SERVANT A a—*Continued.*

means and method of doing the work, while in the case of a factor the agent is given possession of goods with authority to sell in his own name without disclosing the name of the principal or the fact of agency. *Holleman v. Taylor*, 618.

C Master's Liability for Injuries to Servant (Release from liability see Torts C).

b Tools, Machinery and Appliances and Safe Place to Work

1. Evidence tending to show that the plaintiff employed in the construction of a highway was dissatisfied with a particular kind of plow point and was told by his superior employee to make one himself out of certain material left on the highway, and that the plaintiff employee selected an improper piece of material and was injured by a flying particle of steel as he was beating it into shape on an anvil with a sledge hammer, using his own selection of implements, *is held* insufficient to go to the jury on the issue of defendant's actionable negligence, and a judgment as of nonsuit is properly entered. *Austin v. Paving Co.*, 213.

2. Upon evidence tending to show that the plaintiff's injury was caused by the bulging over of defendant's dinky cars, testimony that the defendant's superintendent knew of such condition for several months prior to the injury is competent on the question of the employer's notice of the defect. *Kelly v. Granite Co.*, 326.

f Assumption of Risk

1. An employee has the right to assume that another employee will not suddenly increase the risks of a dangerous employment, and he will not be held to assume such extra risk, and the question of the assumption of risks is ordinarily for the determination of the jury. *Kelly v. Granite Co.*, 326.

g Contributory Negligence of Servant

1. Evidence tending to show that the plaintiff was employed by the defendant to level the bottom of a long deep ditch in laying sewer and water mains where he was directed by his foreman to work, and upon the calling of the warning to "look out" suddenly given, he ran straight ahead towards the place where the ditch was caving in and received the injury in suit, and there is testimony that behind him the way was impeded by the crossing of the sewer and water mains within the open ditch which he was afraid to get over or go under: *Held*, sufficient to apply the rule that in case of sudden peril and emergency an employee is not held to the same degree of care for his own safety as under ordinary circumstances, and the case should be submitted to the jury. *Harper v. Construction Co.*, 47.

D Master's Liability for Injury to Third Person.

a Independent Contractors

1. Under a contract to collect accounts upon a percentage basis where the collecting agent is to use its own methods independently of and free from control by the employer, the relation of employer and independent contractor is created, and where the collector in collecting a debt has the debtor wrongfully and unlawfully arrested

MASTER AND SERVANT D a—*Continued.*

upon a criminal charge, the employer under the terms of the contract is not liable in damages resulting to the debtor therefrom. *Inscoe v. Jewelry Co.*, 580.

2. Where, in an action against the owner of goods to recover for negligent injury inflicted by an alleged employee while distributing the goods to purchasers by automobile, there is evidence that the owner had consigned the goods to the one inflicting the injury, and did not have any control of or interest in the means of travel used by him, and was not liable for his negligent act: *Held*, an instruction failing to sufficiently charge the jury as to the distinction between master and servant and principal and agent or factor, entitles the owner to a new trial. *Holleman v. Taylor*, 619.

E Federal Employers' Liability Act.

a To What Cases the Act Applies

1. The Federal Employers' Liability Act applies to steam logging roads in this State. *McLean v. Hardwood Co.*, 312.

2. In an action against two railroad companies who together employed a mechanic to repair "bad order cars" on a connecting track used and maintained by them both jointly, when the employee is injured while at work on a car in interstate commerce, the Federal Employers' Liability Act applies and the Federal decisions thereunder and the applicable principles of the common law as declared by the Federal courts control in an action brought in the State Court under the provisions of the act. *Hamilton v. R. R.*, 543.

b Nature and Extent of Liability Thereunder

1. The rule that in an action by an employee of a logging road the Federal Employers' Liability Act applies and that contributory negligence will be considered by the jury only in mitigation of damages will not warrant a recovery where the employee was the *alter ego* of his principal and was under duty to see proper conditions surrounded the doing of the work, and his negligence in the discharge of this duty was the sole proximate cause of the injury to himself. *McLean v. Hardwood Co.*, 312.

2. Where the plaintiff's intestate, employed by the defendant as flagman at a crossing, is killed while flagging the defendant's crossing with a lantern furnished by the defendant, and there is evidence that the lantern was sufficient to warn those crossing in automobiles and others, and that the intestate was struck by a fast moving automobile, the driver and owner unknown, which struck the intestate and threw him beneath the defendant's train to his death: *Held*, the conduct of the driver of the automobile was an independent and sole proximate cause of the intestate's death, and a judgment as of nonsuit was properly entered, the case of two causes proximately causing the injury in suit not being applicable to the facts of this case. *Boyd v. R. R.*, 324.

3. The Federal Employers' Liability Act is a humane and remedial statute, and to effectuate its purposes the courts will liberally construe it, and evidence of liability thereunder may be either direct or circumstantial. *Hamilton v. R. R.*, 543.

MASTER AND SERVANT E b—*Continued.*

4. Where two railroad companies operate a connecting track between their respective tracks which is used for repairing "bad order cars," and both employ or pay a mechanic to repair "bad order cars" thereon, and under an agreement between them a "bad order car" is placed upon the track for temporary repair by one railroad company which negligently notifies the other that the car was ready to be moved, and an employee of both is injured while making the necessary repair by the negligence of the latter company in moving the car without taking proper precautions: *Held*, the evidence that the injury was proximately caused by the concurrent and continuing negligence of both under the provisions of the Federal Employers' Liability Act as amended is sufficient, and a recovery for the resultant injury may be had against both as joint *tort-feasors*. *Ibid.*

5. Evidence tending to show that an employee of a railroad company while repairing a brake on a "bad order car" in the course of his employment in interstate commerce, was injured by the defendant's train suddenly and without warning and with unusual force coupling the car without making the customary inspection to see that the car was ready to be moved, is held sufficient to take the case to the jury upon the issue of the defendant's actionable negligence under the provisions of the Federal Employers' Liability Act, as amended. *Ibid.*

6. Where there is evidence that repair work on cars was done on the defendant's tracks in a certain locality without placing blue flags to show that such work was being done, the failure of a repairman to place such flags on the track while making repairs will not be held to constitute contributory negligence as a matter of law under the Federal Employers' Liability Act, the issues of contributory negligence and assumption of risks thereunder being ordinarily for the determination of the jury. *Ibid.*

7. Where issues of negligence, contributory negligence and assumption of risks arise upon the trial of an action under the Federal Employers' Liability Act, the burden of proof is upon the plaintiff upon the issue of negligence, and he must establish the defendant's negligence as the proximate cause of his injury, and the burden is on the defendant to prove contributory negligence and assumption of risks when relied on by him. *Ibid.*

F North Carolina Workmen's Compensation Act.

a Nature, Construction and Applicability

1. The legislative intent should be ascertained and given effect in construing the Workmen's Compensation Act, and its benefits should not be denied upon technical, narrow or strict construction. *Martin v. Sanatorium*, 221; *Baker v. State*, 232.

2. The North Carolina Workmen's Act is to be liberally construed to effectuate its purpose to provide compensation for employees injured in accidents arising out of and in the course of their employment, and the evidence in a proceeding thereunder is to be considered in the light most favorable to the claimant and he is entitled to every reasonable intendment thereof and every reasonable inference therefrom. *Bellamy v. Mfg. Co.*, 676.

MASTER AND SERVANT F a—*Continued.*

3. Whether one is an employee within the meaning of the Workmen's Compensation Act does not solely rest upon the existence of the technical relation of master and servant, but a person is an employee thereunder if he is engaged in employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, and includes all employees of the State or its political subdivisions except such as are elected by the people or the General Assembly or appointed by the Governor. *Baker v. State*, 232; *Moore v. State*, 300.

4. By statute the State has provided for payment in a certain manner to privates who have enlisted in the North Carolina National Guard, and a private therein who has taken the prescribed oath is an employee of the State within the meaning of the Workmen's Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute. N. C. Const., Art. XII, sec. 2; C. S., 6821, 6823, 6864, 6889. *Baker v. State*, 232.

5. A forest warden of a county is given statutory authority to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, C. S., 6136, 6137, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the State within the meaning of the Workmen's Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment. *Moore v. State*, 300.

b Injuries Compensable Thereunder

1. Where the employee of a dairy company used his own automobile in the employer's service, the gasoline furnished by the employer under an agreement that the employee was thus to be transported to and from his work, evidence that the employee received an injury while going to his work in the automobile according to the agreement is sufficient to sustain a finding of the Industrial Commission that the injury arose out of and in the course of the employment under the provisions of the Workmen's Compensation Act. *Dependents of Phifer v. Dairy*, 65.

2. The words "out of and in the course of employment" as used in the Workmen's Compensation Act refer to injuries which follow as a natural incident of the work within the employee's duties and which may reasonably be contemplated as a result of the exposure occasioned by the nature of the employment, and extends to such as may arise while the employee is going to and from his work by being transported under the circumstances as a part of the employment contract. *Ibid.*

3. Evidence tending to show that an employee of a mill using water power had the duty of keeping the race at the dam on the employer's premises clear of obstructions for the continued or proper running of the machinery of the mill, and that he came to his death in assisting the removal of an automobile from the water during his working hours by being drowned in the fast flowing waters in the

MASTER AND SERVANT F b—*Continued.*

race, is sufficient evidence to sustain a finding of the Industrial Commission that his death was caused by an accident arising out of and in the course of his employment and awarding recovery to the claimant under the provisions of the statute. *Southern v. Cotton Mills Co.*, 165.

4. The course of employment within the meaning of the Workmen's Compensation Act refers to the time, place and circumstances under which an accident causing the injury takes place, and an accident is received in the course of employment if the employee is engaged in a duty he is employed and paid to perform, or which is reasonably incident thereto, and an accident arises "out of the employment" when there exists a causal connection between the two, or the accident could be reasonably contemplated as risk incident to or involved in the employment. *Davis v. Veneer Corp.*, 263.

5. Where a mill owner permits an employee to sleep in the mill at night, and there is evidence that the employee voluntarily and without orders assumed to go for the superintendent at his home at night after his duties has ceased, and was struck and killed by an automobile: *Held*, the injury was not received through an accident in the course of the employment within the meaning of the Workmen's Compensation Act, and the fact that he punched the time clock before attempting his errand does not vary the result. *Ibid.*

6. In order to bring extraneous acts of an employee within the course of his employment, as contemplated in the Workmen's Compensation Act, by habit or custom, the character of proof must be clear and convincing as to the antiquity of the custom or use, and also of its duration and universality in the location where it is claimed to exist. *Ibid.*

7. Evidence in this case that the loss of appellant's vision occasioned by gonorrhea ophthalmia resulted naturally and unavoidably from the dropping of gasoline into his eye as a result of an accident arising out of and in the course of his employment, is held sufficient to sustain the award of the Industrial Commission to that effect under the provisions of the act that a compensable injury shall not include a disease in any form except where it results naturally and unavoidably from the accident. *Williams v. Thompson*, 463.

8. Where, in a hearing under the Workmen's Compensation Act, the evidence tends to show that the employee was a salesman and collector, and was furnished an automobile by the employer, that there were no prescribed hours of work, and that after supper the employee left his home to meet a business appointment, and that in order to buy some cigars, chewing tobacco, etc., he regarded as expedient to the purpose of his business visit, he deviated some 3,500 feet to a drug store, and was injured in a collision while going from the drug store to the place of business of the customer, is held sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment. *Parrish v. Armour & Co.*, 654.

9. Where the evidence tends to show that the employees in the defendant's spinning department were required to remain in the mill for

MASTER AND SERVANT F b—*Continued.*

a half hour after work therein had stopped, and that one of the employees therein was injured during this time in an accident while riding in an elevator to another floor with a friend for the purpose of seeing about getting her friend a job in the mill, and that it was the custom of the employees to use the elevator: *Held,* under a liberal construction of the Workmen's Compensation Act, the accident was in the course of the employment and the employee was entitled to compensation. *Bellamy v. Mfg. Co.*, 676.

d Proceedings

1. The express provision of the statute conferring upon the Industrial Commission the power to subpœna witness for a hearing before it or one of its members designated for that purpose is not impaired or diminished by the provisions of the act empowering the Superior Court in proper instances to aid the Commission in procuring the attendance of witnesses at its hearings, or before any member or deputy thereof. *In re Hayes*, 133.

2. The State has waived its sovereignty as to the claim of an injured employee under the Workmen's Compensation Act, and under the act trial by jury is not a constitutional right, and an objection to an award of the Industrial Commission to the dependents of a county employee on the ground that the act deprives the defendant of its right to trial by jury is without merit. Const., Art. I, sec. 19. *Hagler v. Highway Commission*, 733.

g Persons Entitled to payment

1. Construing section 2, subsection (o) of the Workmen's Compensation Act defining a widower entitled to the benefits as one who had lived with the wife at the time of her death and "was dependent upon her for support" in connection with section 39 defining dependents, it is *held:* to fully support the beneficial intent of the act the provisions in the latter to the effect that the widower be conclusively presumed a dependent of the wife is manifestly clear, and that under this presumption he is entitled to compensation for the death of his wife with whom he was living when her death was caused by an accident arising out of and in the course of her employment. *Martin v. Sanatorium*, 221.

h Amount Recoverable Thereunder

1. Where the Industrial Commission grants an award for partial loss of vision for such time as the applicant's percentage of loss of vision bears to the total of 100 weeks, section 31(t), the said percentage to be determined by a recognized eye specialist to be selected by the Commission: *Held,* the Industrial Commission has the authority under section 63 of the act to appoint a physician for the purpose, the matter being *in fieri* and the defendants being entitled to notice and hearing before final award, the Commission having power to modify an award upon change of condition, section 42. *Williams v. Thompson*, 463.

2. Evidence that an employee, sustaining an injury compensable under the Workmen's Compensation Act, suffered permanent loss of hearing in one ear as the result of the accident, is held sufficient to sustain an award of the Industrial Commission for permanent damages therefor under the act. *Parrish v. Amour & Co.*, 654.

MASTER AND SERVANT F—*Continued.*

i Review of Proceedings

1. The facts found by a member of the Industrial Commission upon supporting evidence in a hearing before him, and approved by the full Commission, are conclusive upon the courts upon appeal. *In re Hayes*, 133; *Southern v. Cotton Mills Co.*, 165; *Williams v. Thompson*, 463; *Parrish v. Armour & Co.*, 654.

2. Where there is an admission contained in the report of the Industrial Commission passing upon the question of awarding compensation to an employee of the State, that the employee was in the employment of the State and that the accident arose out of and in the course of the employment, these being admissions as to the law upon the facts, the courts will disregard them. *Moore v. State*, 300.

MENTAL CAPACITY—To sign release see Torts C c; evidence of, see Wills D h; insane persons see Insane Persons.

MILITIA—Workmen's Compensation Act applies to, see Master and Servant F a 2, 3.

MORTGAGES (Reformation of, see Reformation of Instruments; chattel mortgages see Chattel Mortgages; allotment of homestead in equity of redemption see Homestead A e 1).

C Construction and Operation.

c Lien and Priority; Registration (Receiver takes property subject to registered, see Corporations H b).

1. Our statute requiring the registration of instruments to give priority of liens in certain instances, C. S., 3311, does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. *Wallace v. Benner*, 124.

E Assignment of Mortgage or Debt.

c Equitable Assignment and Subrogation

1. Where the application for a loan from a Federal land bank expressly sets up prior registration mortgages on the lands and states that with the proceeds of the loan applied for the prior mortgages shall be paid (the law requiring a first lien) and the land bank accepts the application and sends its check to its attorney investigating the title to be endorsed by him and the borrower and used in conformity with the instructions that a first lien would be created on the lands for its loan, and in disobedience to these instructions the loan is used to pay off the first mortgage but not the second: *Held*, the land bank is entitled in equity to subrogation to the lien of the first mortgage as against the second mortgagee, and the agreement of the first lienor to this effect operates as an equitable assignment of his lien giving priority over the lien of the second mortgage. *Wallace v. Benner*, 124.

H Foreclosure.

b Right to Foreclose and Defenses

1. The foreclosure sale under a power in a deed of trust securing the balance of purchase money will not be restrained for a breach of warranty against tax assessment liens where it is made to appear

MORTGAGES H b—*Continued.*

that the plaintiff had agreed to assume the assessment and receive a credit of the amount upon his note for the purchase price, the credit having been made according to the agreement. *Fisher v. Finance Co.*, 9.

2. Where in a civil action by the receiver of a mortgage company and junior lienors to restrain the foreclosure of a mortgage and to have the debt secured thereby credited with the sums alleged to have been paid, and to have the amount of the debt reduced by the forfeiture of interest, it being alleged that the contract was tainted with usury: *Held*, although the plaintiffs would not be entitled to injunctive relief as a deliverance from alleged exaction of usury, upon the defendant's demand for affirmative relief, the plaintiffs are entitled to know the correct balance due on the indebtedness in order to protect their interests, and a temporary order restraining the foreclosure is properly continued to the final hearing. *Parker Co. v. Bank*, 441.

3. The holder of a second mortgage on lands brought action against the first mortgagee to restrain the foreclosure of the first mortgage. The court found as a fact that the second mortgagee was ready, able and willing to pay, upon assignment of the mortgage, the amount of the debt secured thereby, less interest, the second mortgagee alleging that usury had been charged thereon, C. S., 2306, the charge of usury was denied by the first mortgagee: *Held*, the second mortgagee was entitled to have the restraining order continued to the final hearing in order that the amount of the debt might be ascertained by the determination of the issue of usury. *Wilson v. Trust Co.*, 788.

h Execution of Power of Sale

1. Where a deed of trust is given to secure an indebtedness of the trustor the title passes to the trustee for the purpose of security, and the insolvency of the trustee does not affect his duty to make a sale under the power of sale contained in the deed, and where the trustee becomes insolvent after the right to foreclose has become fixed according to the terms of the deed, and a chief State Bank Examiner has been appointed, in the absence of statute, the said Bank Examiner may not exercise the power of sale, the remedy being a civil action by the holders of the notes against the trustor and the trustee, or proceedings to foreclose by the trustee under the power, or they all can agree upon a substitute trustee. *Mitchell v. Shuford*, 321.

2. A land company borrowed money on its property and conveyed it to a bank as trustee to secure notes in the hands of purchasers, the deed directing foreclosure by the trustee or its successors or assigns upon certain conditions, and the trustee bank becoming insolvent, and a receiver being appointed, the court ordered the receiver to foreclose and make title to the purchaser at the sale, the receiver executed the power of sale contained in the deed of trust in accordance with its terms, and offered a deed in proper form to the purchaser: *Held*, applying C. S., 1209, 1210, under the facts of this case, the deed was sufficient in law to pass title. *Trust Co. v. Hudson*, 688.

MORTGAGES H—*Continued.*

m Title and Rights of Purchaser

1. Where the purchaser of lands at foreclosure under the power of sale contained in a mortgage, intervenes in the landlord's action against the tenant for the possession of crops grown thereon, depending upon her title acquired under her deed given in pursuance of the sale, the burden of showing her title is upon the intervener, and she must establish as against the plaintiff the fact that the crops in question had not been severed or harvested at the time she had acquired her title under her deed, and a mere showing of demand for the crops is not sufficient. *Jennings v. Shannon*, 1.

2. Lien upon the crops grown on lands by a tenant are incident to and connected with the estate in reversion and follows the assignment to a bargainee unless the crops are at the time severed or secured by a bond or note sufficient to break the connection and separate the obligation from the estate, and where mortgaged lands are in possession of a tenant and a foreclosure is had during the term of the lease the right to the lien on the crops for rent is dependent upon title to the land. *Ibid.*

3. Where an intervener claiming crops grown upon the mortgaged lands as the purchaser of the lands at the foreclosure sale of the mortgage, any offsets or credits she may desire to claim against the mortgagor should be set up by her before judgment, and *held further*, under the facts of this case the question as to whether the purchaser paid for the lands upon delivery of her deed is not important. *Ibid.*

4. Innocent purchaser for value without notice acquires good title unaffected by fraud in prior foreclosure sale. *Wood v. Trust Co.*, 105; *Cheek v. Squires*, 661.

5. Deed of purchaser at foreclosure sale will not be declared void for failure of clerk to order trustee to make deed. *Cheek v. Squires*, 661.

6. Purchaser's title is not affected by trustee's failure to make entry on margin of record nor by his failure to file statement. *Ibid.*

o Resale

1. The allowance to be made a mortgagee as his commissions for several times selling the lands under advance bids is governed by the principle announced in *In re Hollowell Land*, 194 N. C., 222, where the lands were foreclosed by a trustee in a deed of trust. *In re Mortgage Foreclosure*, 636.

p Setting Aside for Fraud or Irregularity

1. Purchaser in this case held to have obtained good title unaffected by alleged fraud in foreclosure of prior mortgage. *Wood v. Trust Co.*, 105.

2. Where a deed of trust on lands has been foreclosed and a deed made to a purchaser, and his grantee has conveyed the lands to another who executes another deed of trust thereon to secure notes for money loaned, the knowledge of any fraud under the first foreclosure the attorney may have had will not be imputed to the purchaser at the foreclosure sale under the second deed of trust from the fact that the same attorney acted at different times inde-

MORTGAGES H p—*Continued.*

pendently in making an investigation of the title which appears to be regular and good upon the books in the office of the register of deeds of the proper county. *Ibid.*

3. Where a deed of trust has been foreclosed by the trustee in conformity with the power of sale, and the sale accordingly made is sought to be set aside in equity for fraud, inadequacy of the purchase price must be coupled with some other inequitable element to be sufficient, and mere inadequacy of purchase price standing alone is insufficient to entitle the plaintiff to the relief sought. *Roberson v. Matthews*, 241.

4. C. S., 2594(5) has no application to mortgages given prior to its passage and it does not operate to wipe out a valid debt existing at the time it became effective, and it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee. *Ibid.*

5. Where one acting for the trustee in a deed of trust becomes the purchaser for the trustee, equity has the power to set the sale aside, and where there is evidence thereof in a suit to set aside the foreclosure sale the question is for the jury to decide as to the fact of such agency under proper instructions from the court. *Ibid.*

6. The omission of the clerk to make an order to the trustee to give a deed to the purchaser at a foreclosure sale of a deed of trust is an irregularity in the foreclosure proceedings, but where the trustee has complied with the terms of the power of sale and has executed a deed to the purchaser, the purchaser's title will not be held void solely on that account, the duty of the clerk to make the order being purely ministerial. C. S., 2591. *Cheek v. Squires*, 661.

7. The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of C. S., 2594(a) in entering upon the margin of the record in the office of the register of deeds the fact and date of foreclosure, the person to whom sold, etc., nor by the failure of the trustee to comply with C. S., 2594(b) requiring that he file in the clerk's office a statement of receipts and disbursements of all funds coming into his hands by reason of the sale, for although the failure of the trustee to perform these duties constitutes irregularity in the foreclosure proceedings, the performance of these duties not being required until after the sale, the failure to perform them cannot affect the title of the purchaser unless he has notice of fraud. *Ibid.*

8. Where an officer of a real estate corporation acts for the corporation in foreclosing a deed of trust in which the corporation is trustee, and at the sale the land is bid in by an employee of the corporation who does not pay any part of the purchase price, and who afterwards transfers the land to another who gives a deed of trust to the corporation to secure the balance of the purchase price: *Held*, upon the foreclosure of the second deed of trust, the purchaser at the sale, being an innocent purchaser for value, acquires a good title unaffected by the fraud in the foreclosure of the first

MORTGAGES H p—*Continued.*

deed of trust and free from the claims of the *cestui que trust* therein: and, *held further*, knowledge of the fraud committed by the officer of the trustee corporation will not be imputed to another corporation lending money for the payment of part of the purchase price to the purchaser at the last sale, although the officer was also an officer of the lending corporation, the fraud being committed in the interests of the trustee corporation and against the interests of the lending corporation. *Ibid.*

MUNICIPAL CORPORATION (Property exempt from taxation see Taxation B d 3; bonds for public construction see Principal and Surety B b; adverse possession of streets see Adverse Possession A i).

A Creation, Alteration, and Dissolution.

a Incorporation

1. Where two land corporations have for their purpose the exploitation of mountain scenery, the interest of each being closely interwoven with the other, the lands of each connected by a scenic highway, there is no constitutional inhibition upon the Legislature from incorporating the lands of both into the limits of one town because there is a small intervening acreage between the lands incorporated, and an act incorporating the two tracts of land is held valid under the peculiar facts of this case although the tracts are not contiguous, and the municipality so created may lawfully exercise the power to tax lands within the limits conferred by its charter. *Chimney Rock Co. v. Lake Lure,* 171.

c Attacking Validity of Charter

1. While ordinarily the validity of a charter of a municipality cannot be collaterally attacked, the Supreme Court under the facts and circumstances of this case, decides the appeal upon its merits, it being to the public interest, involving the validity of taxes levied and bonds issued by the municipality. *Chimney Rock Co. v. Lake Lure,* 171.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets or Other Public Places

1. A municipal corporation holds its streets for the safe use of the public, and its building inspector may not permit an owner of property thereon to so erect a building on his own lands as to be a menace of injury to pedestrians or others, and by permission to the owner permit him to escape from the damages caused to a user of the street. *Swinson v. Realty Co.,* 276.

2. Where in an action against a city the evidence tends to show that roping used by the city to guard a ditch in the street was caught in a city truck being used to deliver wood to the poor of the city as a charitable measure, and that the truck threw the rope against the plaintiff causing the injury in suit: *Held,* the evidence discloses that the injury resulting from an unforeseen accident unrelated to the proper guarding of the ditch, and evidence as to the usual method of guarding ditches and the means approved and in general use, and an ordinance of the city in respect thereto, is irrelevant, and the refusal of the court to admit such evidence is not error. *Cranfield v. Winston-Salem,* 680.

MUNICIPAL CORPORATIONS E c—*Continued.*

3. A city is liable in damages to one whose personal injury or death is proximately caused by a dangerous condition of its streets of which the city had sufficient express or implied notice. *Pickett v. R. R.*, 750.

4. Where a dangerous place in the street of a city has existed for a sufficient length of time to have been known by the city in the exercise of due care in inspection, the city will be held to have implied knowledge thereof, and where there is evidence that a dangerous condition in the street of a city had existed for about four months, and that the superintendent of public works of the city, in the course of his duties, passed thereover several times a day, it is sufficient evidence of notice by the city of such dangerous condition. *Ibid.*

5. Where the State Highway Commission has taken over the construction of a street and bridge within the incorporated limits of a town, the town is not thereby relieved of liability for an injury proximately caused by a dangerous condition of the street at the bridge when the town has had implied notice of such condition which had existed for several months, C. S., 3846(j) providing that the State Highway Commission should assume full and exclusive responsibility for the maintenance of all roads forming a part of the State highway system expressly excepting from its provisions streets in towns and cities. *Pickett v. R. R.*, 570.

d Defects or Obstructions in Sewers, Drains or Water Courses

1. An incorporated town is liable in damages to the lands of a lower proprietor on a stream for the disposal of sewage into the waters of a stream causing depreciation in the value of the land of the lower proprietor upon the principle that it amounts to a taking of private property for a public use to the extent of the damage, requiring compensation to be paid under the provisions of our Constitution. *Wagner v. Conover*, 82.

2. Where the injury to the plaintiff's land is shown to be of a permanent nature and caused by the sewerage disposal plant of the defendant incorporated town, permanent damages may be awarded by the jury, measured by the difference in value of the land before and after the time the sewer system was constructed and maintained. *Ibid.*

3. A municipality may not escape liability for damages to the land of a lower proprietor caused by its maintenance of a sewerage disposal plant upon the ground that it was done in the exercise of a governmental function. *Ibid.*

4. Noxious gases affecting the health of those living upon the land may be considered by the jury in assessing damages to the plaintiff's land caused by the defendant municipality's sewerage disposal plant as an element causing depreciation to the value of the land. *Ibid.*

5. Where prospective damages are awarded against a municipality for maintaining and operating a sewerage disposal plant to the damage of plaintiff's land lying lower down upon a stream into which

MUNICIPAL CORPORATIONS E d—*Continued.*

the sewage was emptied, in assessing plaintiff's prospective damages the judgment should include such future damages as will result to the land from the lawful maintenance of the sewerage plant that had been constructed. *Ibid.*

6. Where there is evidence tending to show that the plaintiff's land was diminished in value by a municipality disposing of its sewage in a stream above the land, no error will be found in the instruction of the court confining the injury to that done to the plaintiff's land when, considering the charge as a whole, the jury must have awarded damages for the injury to the land in exclusion of any separate damages to the health of the plaintiff or those living upon the land. *Ibid.*

7. In an action by the owner of lands against a city to recover damages caused by an overflow of a stream containing sewage, the parties have the right to confine the inquiry to temporary damages, and where they have done so, an issue as to permanent damages submitted by the court in lieu thereof over the plaintiff's objection is reversible error. *Harmon v. Bessemer City*, 690.

H Police Powers and Regulations.

b Zoning Ordinances

1. It is within the police power of an incorporated city or town to enact an ordinance under authority of statute prohibiting the erection or maintenance of a gasoline filling station within the town limits within one hundred and fifty feet of its designated graded school, and although filling stations will not be held nuisances *per se* as a matter of law, such ordinances will not be held unconstitutional in the absence of evidence that it is arbitrary or discriminatory, the burden being on the plaintiff, to prove it unconstitutional and void. *Ahoskie v. Moye*, 11.

e Violation and Enforcement of Police Regulations (Enjoining enforcement of tax ordinance see Taxation E b).

1. Section 8, chapter 250, Public Laws of 1923, permits the issuance of a restraining order in favor of a city against the erection and maintenance of a filling or gasoline station contrary to its ordinance, and the refusal to issue such restraining order on the ground that the remedy of the city for the violation of its zoning ordinance is by indictment alone is erroneous. *Elizabeth City v. Aydlett*, 58.

2. Where individual property owners and a city seek injunctive relief against the erection and maintenance of a gasoline filling station within a zoning district within the city, the individual plaintiffs alleging permanent and irreparable injury to their property, a demurrer on the grounds that authority to bring the suit had not been shown by the individual or corporate plaintiffs is bad, the allegations of the complaint of the individual plaintiffs being sufficient as to them, and the municipality having the statutory right given it. Section 8, chapter 250, Public Laws of 1923. *Goldsboro v. Supply Co.*, 405.

MUNICIPAL CORPORATIONS—*Continued.*

J Actions Against Municipal Corporations.

b Charter Provisions as to Notice and Limitation of Time for Bringing Action

1. A city charter which provides that a grant of land by the owner for street purposes will be presumed after two years from the date it has been taken for such purposes by the city will bar the owner's right of recovery when he has failed to bring action for damages until after the limitation so fixed, and in this case *Held:* the assurance of the city engineer that the city was not taking the land at the time of the commencement of the work does not make it inequitable for the city to plead its charter in bar, it appearing that the city had then actually taken the land and had continuously used the same for street purposes without objection for more than the period stated. *Woods v. Durham*, 608.

K Fiscal Management and Taxation.

a Power to Issue Bonds or Levy Taxes (See, also, Taxation A).

1. A municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may issue bonds in excess of this limitation. Const., Art. VII, sec. 7, construed with Art. V, sec. 6. *Burleson v. Board of Aldermen*, 30.

2. While an incorporated town may not issue valid bonds for the erection and maintenance of a public hospital with the approval of its voters without statutory authority, this authority is conferred by C. S., 2796, 2937, and where a proposed issuance of such bonds had been authorized by ordinance under the provisions of C. S., 2938, and approved by the voters according to the provisions of C. S., 2948, and the other statutes relevant have been duly followed, the bonds so issued are a valid obligation of the town issuing them, and their issuance will not be enjoined by the courts, C. S., 7255, not applying to the facts of this case. *Ibid.*

MURDER see Homicide.

NATIONAL GUARD see Master and Servant F a 2, 3.

NEGLIGENCE (Distinction between action for negligence and for nuisance see Actions B d; negligence of persons in particular relationships see Master and Servant, Parent and Child, Guardian and Ward; negligence in particular circumstances see Highways B, Railroads D, Electricity, Waters and Water Courses C c, Food A a, Municipal Corporations E d; actions for wrongful death see Death B).

A Acts or Omissions Constituting Negligence.

c Condition and Use of Land and Buildings and Liability of Owner or Lessee (As constituting nuisance see Nuisance A b).

1. For damages against a landlord caused by a negligent condition of the premises a sublessee can have no greater claim against the landlord than his lessor, and in the absence of evidence that the landlord was under obligation to keep the premises in repair a judgment as of nonsuit is properly entered. *Salter v. Gordon*, 381.

NEGLIGENCE A—*Continued.*

d Anticipation of Injury

1. It is not required that a *tort-feasor* should have anticipated the particular injury resulting from his negligent act in order to hold him responsible therefor in damages, but he is responsible for all the consequences of his negligent act which are natural and probable when injury or harm from the act could have been foreseen by a reasonably prudent man under the circumstances. *Hamilton v. R. R.*, 543.

f "Act of God"

1. The defense of an "act of God" is not available in an action to recover damages for the negligent destruction of personal property when the defendant's act unites therewith as an efficient proximate cause in producing the result. *Nance v. Fertilizer Co.*, 702.

B Proximate Cause.

c Intervening Negligence

1. Where the negligence of a third person is the sole proximate cause of the injury in suit, and acts independently of any alleged negligence on the part of the defendant, the defendant cannot be held liable for the resulting injury. *Boyd v. R. R.*, 324.

d Concurring Negligence

1. In an action to recover damages for an alleged negligent injury there may be two or more proximate causes of the injury, and where this condition exists and the party injured is free from fault, those responsible for the causes are liable for the entire damages sustained as joint *tort-feasors*, and the negligence of one will not be permitted to exculpate the other, there being no right to contribution between joint *tort-feasors*. *Smith v. R. R.*, 177; *Little v. Furniture Co.*, 731.

2. A prior negligent act may be a joint proximate cause of an injury if uniting with a subsequent negligent act of another it operates in a continuous and unbroken sequence to produce the injury in suit. *Hamilton v. R. R.*, 543.

C Contributory Negligence.

a Of Persons Injured in General

1. In case of sudden peril employee is not held to same degree of care for his own safety as is ordinarily required of him. *Harper v. Construction Co.*, 47.

2. Contributory negligence is the failure of the plaintiff to exercise care of ordinarily prudent man under the circumstances. *Murphy v. Coach Co.*, 92.

d Burden of Proving Contributory Negligence

1. The burden of showing contributory negligence is on the defendant when relied on by him. *Murphy v. Coach Co.*, 92; *Smith v. R. R.*, 177.

NEGOTIABLE INSTRUMENTS see Bills and Notes.

NEW TRIAL—Setting aside verdict see Trial G a; motions for new trial in criminal action see Criminal Law J c; right to jury trial upon exceptions to referee's report see Jury C a 1.

NON OBSTANTE VEREDICTO see Judgments F d.

NONSUIT see Trial D a; in criminal actions see Criminal Law I j.

NUISANCE (Distinction between actions for nuisance and negligence see Actions B d).

A Conditions Constituting Nuisances.

a In General

1. A nuisance may or may not involve elements of negligence and may exist not only by reason of a positive act, but by negligent failure to perform a positive duty, and primarily a nuisance is a condition and not an act, and a thing or act which may be lawful may be a nuisance because of its negligent use or operation. *Swinson v. Realty Co.*, 276.

b Condition and Use of Buildings

1. Where the owner has erected a building having a water hydrant projecting from the wall above a sidewalk, the question as to whether this constitutes an actual nuisance as being a menace to pedestrians using the sidewalk is dependent upon surroundings or conditions under which it is maintained or whether against the public rights or general welfare, and is ordinarily a question for the determination of the jury in an action for damages for an injury caused thereby. *Swinson v. Realty Co.*, 276.

2. In an action to recover damages against the owner of a building having a hydrant projecting above the sidewalk nine inches, causing injury to a pedestrian at night, testimony as to whether the place was sufficiently lighted by the city is competent although the city is not a party to the action. *Ibid.*

OFFICERS—Bonds of public, see Principal and Surety; actions to try title to, see Actions B b.

PARENT AND CHILD.

A Rights and Liabilities of Parent.

a Liability for Negligence of Child Driving Family Car

1. The father is not ordinarily liable for the torts of his minor son by reason of the relationship, and his liability must be predicated upon some principle of agency or employment, and where the son causes injury while driving his father's automobile the theory of agency is determined by the "family car" doctrine. *Grier v. Woodside*, 759.

2. Where a parent owns an automobile for the convenience and pleasure of his family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use and the parent will be held responsible for the negligence of the son causing injury to another. *Ibid.*

3. The consent of the parent to the use of his family automobile by the son for the sole purpose of the latter may be implied from the circumstances, such for example, as the habitual or customary use for his own purposes by the son, and where there is evidence to this effect the testimony of the father that at the time of purchas-

PARENT AND CHILD A a—*Continued.*

ing the car he told his son not to use it without his consent raises the question of the implied consent of the father as against the father's motion as of nonsuit. *Ibid.*

PARTIES (Misjoinder of parties and causes see Pleadings D b; parties in action on surety bond see Principal and Surety B e 1; in action on contract see Contracts F a; remand for necessary parties see Appeal and Error K a).

B Defendant.

a Necessary Parties

1. Where a will devises and bequeaths all the testatrix's property of whatsoever kind to the children of the testatrix in trust, naming the husband as trustee with full power of sale, reinvestments, etc., in their behalf, and the beneficiaries thereunder bring an action to restrain or set aside a foreclosure sale under a mortgage given by the trustee on the lands affected by the trust: *Held,* the trustee's interest in the result of the suit makes him a necessary party thereto, and where he has not been made a party either plaintiff or defendant the Supreme Court on appeal will not decide the case presented upon the sole question as to whether his mortgage given upon the lands falls within the authority vested in him under the will, and consequently whether the sale was valid or otherwise. *Wiggins v. Harrell,* 336.

2. Where a necessary party to an action will not join with the plaintiffs therein, they may have him made a party defendant when necessary for a final adjudication of the matters involved. *Ibid.*

b Persons Who May be Sued

1. The purchaser of a lease at the receiver's sale of an insolvent corporation is not a necessary party to enforce a claim filed with the receiver for damages for the breach of the lease contract by the insolvent corporation or its receiver, and the refusal of a motion to make such purchaser a party to the proceedings is not error, C. S., 460, if such purchaser is a proper party the motion is addressed to the sound discretion of the trial court and not reviewable on appeal. *Trust Co. v. Transit Lines,* 415.

2. Where the deceased clerk of the Superior Court has commingled his personal and official funds and invested them as the law requires for the latter, and the suit is only for the appointment of a receiver to separate the investments which are amply sufficient to cover his official accounts, the sureties on the bonds of the deceased clerk are neither necessary nor proper parties to the action, and an order of the trial court in making them parties over their objection is error. *Williams v. Hooks,* 419.

PARTITION—Does not adjudicate title see Judgments M a 1.

PATENTS—Taxation of, see Taxation A i.

PHOTOGRAPHS—Admissibility in evidence see Evidence D j; X-ray photographs see Evidence K b 2.

PLEADINGS (Pleading fraud see Fraud C b; estoppel see Estoppel D b; usury see Usury C a; in action on note see Bills and Notes H b).

C Counterclaims (Burden of proof on, see Evidence C d).

b Definition and Subject-matter

1. Under the provisions of C. S., 521, a counterclaim is defined to be a claim existing in favor of the defendant arising out of contract or transaction alleged in the complaint as a foundation for the relief sought or a claim connected with the subject-matter of the action or other cause existing *ex contractu* at the commencement of the action, and subject to these limitations it includes practically every kind of cross-demand existing in the defendant's favor in the same right, either legal or equitable. *Insurance Co. v. Griffin*, 251.

c Effect and Subsequent Pleadings

1. Where the plaintiff life insurance company brings action to cancel its policy for fraudulent statements inducing the plaintiff to reinstate the policy upon application of the defendant, and in the defendant's answer he alleges that he had refused the plaintiff's demand for the return of the policy because benefits under its disability clause had already accrued to him under the terms of the policy: *Held*, the answer sets up a counterclaim, though indefinitely stated, and the plaintiff's remedy is to apply, before answer or demurrer, to the court to require the defendant to make his allegations more definite, and the plaintiff's motion for a voluntary nonsuit over the defendant's objection is properly refused. *Insurance Co. v. Griffin*, 251.

D Demurrer.

a Statement of Cause of Action

1. Where one of several of the causes of action alleged in the complaint is good a demurrer thereto for insufficiency to state a cause of action is bad. *Stepp v. Stepp*, 237.

b Misjoinder of Parties and Causes

1. Where the complaint alleges that several and independent defendants are indebted to the plaintiff in a certain amount arising on separate contracts, a demurrer on the ground of misjoinder of parties and causes of action will be sustained. *Warden v. Andrews*, 330.

c Speaking Demurrer

1. Upon a demurrer to a complaint upon the ground of the pendency of a prior action in another county between the same parties upon the same subject-matter, the fact of the pendency of such action must appear in the complaint in order to be sufficient ground for sustaining the demurrer, and an affidavit accompanying the demurrer and stating the facts constituting the grounds thereof is insufficient. *Buchanan v. Feldspar Milling Co.*, 52.

2. A demurrer to the complaint upon the ground that the statute conferring jurisdiction on the court is unconstitutional, is bad as a speaking demurrer and will be overruled. *Ellis v. Perley*, 403.

d When Demurrer May be Pleaded and Waiver of Right by Failing to Plead in Apt Time

1. By answering to the merits of an action a defendant waives his right to demur to the complaint for misjoinder of parties and causes of action. *Goldsboro v. Supply Co.*, 405.

PLEADINGS D—*Continued.*

e Effect of Demurrer

1. Where the complaint in an action on the surety bond of a contractor, conditioned upon the faithful performance of a contract, alleges that the bond has been executed and was binding on the surety, a demurrer thereto admits this as a fact, and the position that the plaintiff had not sufficiently alleged the proper execution of the bond by the defendant surety corporation cannot be sustained. *Watson v. King*, 8.

2. A demurrer admits the relevant facts set out in the complaint and such relevant inferences of fact as may be deducible therefrom, but it does not admit conclusions or inferences of law, and references to the place where plaintiff's injury occurred as a "death trap" and to the negligence of defendant as "wilful and wanton" will be disregarded as inferences of law. *Andrews v. R. R.*, 483.

E Amendment.

a Right to Amend in General

1. Where, in an action involving the issue of negligence, contributory negligence is pleaded in substance by defendant, an amendment allowed defendant to make his allegation more specific is not held reversible error under the facts of this appeal. C. S., 545, 547. *Gholson v. Scott*, 429.

2. An amendment to pleadings will not be allowed to extend beyond the scope of completing the cause alleged, and where a motion is allowed which makes a new party defendant, who is sought to be held solely responsible, it constitutes a new action and not an amendment. *Jones v. Vanstory*, 582.

b Notice of Motion to Amend and Hearing

1. Unless a verbal or written motion to amend a complaint after time for filing answer has expired be made at the trial term of the action, previous notice of ten days must be given the defendant unless the time is shortened by the court, and an order allowing the amendment to be made, entered without such notice, is irregular. C. S., 545, 912. *Discount Corp. v. Butler*, 709.

H Filing and Service.

a Time for Filing Pleadings

1. N. C. Code, 1927, 509, providing that the clerk may not extend the time to file answer for more than twenty days from the time the answer is due to have been filed, except by consent of parties, does not affect the right of the Superior Court judge to allow an extension of time under C. S., 536, in his discretion upon such terms as he may deem just, but the matter is within his discretion, and no appeal will lie from his refusal to allow a defendant to file answer after the trial is called. *Washington v. Hodges*, 364.

b Service of Pleadings

1. Where one defendant has, with the consent of the plaintiff been allowed an extension of time to file answer and has interposed a defense involving the rights of his codefendant, the latter who has filed no answer is bound by the discretionary ruling of the judge refusing to allow him to file answer upon his discovery of the matter alleged in the answer of his codefendant which was not

PLEADINGS H b—*Continued.*

served on him, such answer not setting up a cross-action by the defendant filing it against the complaining defendant. *Washington v. Hodges*, 364.

I Motions.

a Motions to Strike Out Irrelevant Matter

1. Where upon the plaintiff's motion, made in apt time, C. S., 537, an order is made striking out certain parts of the answer as being irrelevant and immaterial, and the answer, after the matters objected to have been stricken out, is sufficient to raise all issues of law or fact involved, and the defendant is not deprived of any substantial right or defense thereby, the order will not be held for error. *Bank v. Atmore*, 437.

POLICE POWER see Municipal Corporations H.

POLL TAXES see Taxation B g.

POWER COMPANIES see Electricity.

POWERS see Wills F h.

PRINCIPAL AND AGENT (Brokers and commissionmen see Brokers and Commissionmen; distinction between principal and master see Master and Servant D a 2; collecting agent see Bills and Notes G c).

A The Relation.

d Duration of Agency and Termination

1. The appointment of an authorized agent to act in behalf of a principal will be presumed to continue in the absence of anything to show revocation. *Bank v. Howell*, 638.

C Rights and Liabilities as to Third Parties.

b Powers of Agent

1. Evidence in this action to recover the price of goods sold and delivered is held sufficient to show that the purchaser's agent had actual or apparent authority to bind his principal in making the purchase. *Buchanan v. Carolina Stores*, 792.

c Notice to or Knowledge of Agent

1. Principal will not be held to have implied knowledge of fraud of agent committed by him while acting for another principal. *Cheek v. Squires*, 661.

PRINCIPAL AND SURETY.

B Nature and Extent of Liability on Surety Bonds.

b Bonds for Public Construction

1. Money loaned a contractor building a State highway, evidenced by the contractor's note specifying that it was to be used for the payment of laborers and materialmen in the construction of the road, is not included within the terms of the statutory surety bond of the contractor, and the surety is not liable therefor although the money was actually used as agreed in the note, unless the lender obtains an assignment from the laborers and materialmen of their rights. *Trust Co. v. Construction Co.*, 304.

2. A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit changes its liability as a surety on the bond, and C. S., 2445,

PRINCIPAL AND SURETY B b—*Continued.*

providing that a creditor's bill should be the remedy of material furnishers, etc., and that the action shall be brought in the county where the buildings were erected is not applicable. *Mfg. Co. v. Hudson*, 541.

3. While the board of trustees of the East Carolina Teacher's College is made a body corporate, it is not a municipal corporation within the meaning of C. S., 2445, requiring that an action against the surety on the contractor's bond for public construction be brought in the county in which the buildings were erected. *Ibid.*

e *Actions on Surety Bonds* (Surety not necessary party in action to separate personal and official funds of clerk see Parties B b 2).

1. Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise the amount of the liability of the contractor before uniting his surety as a party to an action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. *Watson v. King*, 8.

PRIVILEGED COMMUNICATIONS see Criminal Law G q, Libel and Slander B.

PROCESS.

B Service of Process (Waiver of service by general appearance see Appearance A b).

a *Service on Domestic Corporations*

1. The statutory provisions as to service of summons on private corporations must be observed, C. S., 483, and where individuals, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named. *Jones v. Vanstory*, 582.

b *Personal Service on Nonresidents*

1. Where the summons in an action has been returned by the proper process officer "defendant not to be found," etc., and thereon and from verified pleadings of a party the location of the defendant is determined and personal service has been made, an exception to the validity of the service on the ground that the place of residence of defendant in another State was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of the statute having been substantially complied with, C. S., 491, a different rule applying to C. S., 484, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time. *Casualty Co. v. Green*, 535.

c *Service by Publication and Attachment* (In proceedings to foreclose tax sale certificate see Taxation H b).

1. Where the mortgagor is in possession of the lands in this State the interest of a nonresident mortgagee therein is not subject to attachment levied for the purpose of having the court obtain jurisdiction. *Berry v. Ellis*, 283.

2. Where a nonresident defendant has had his property in this State attached for the purpose of bringing him within the jurisdiction of our courts, and it is made to appear that his interest in the prop-

PROCESS B c—*Continued.*

erty was insufficient for a valid attachment, the action will be dismissed on his motion made in a special appearance for that purpose, when he has not otherwise been legally served and he has not waived his rights. *Ibid.*

3. Our statute allowing service of summons by publication, C. S., 484, providing among other things that it be made to appear to the satisfaction of the court by affidavit that the person to be served "cannot after due diligence be found in the State" is in derogation of the common law, and its requirements must be substantially complied with, and *held:* where the summons has been duly returned "defendant not to be found in the State," and at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the State, and was a resident of another State, the statute was substantially complied with and the validity of the service is upheld. *Bethell v. Lee*, 755.

QUO WARRANTO see Actions B b 1.

RAILROADS (As carriers see Carriers; liability for injuries to employees see Master and Servant E).

D Operation.

b Accidents at Crossings

1. Where the plaintiff's intestate is a guest in an automobile driven by the owner and is killed in a collision with a railroad train at a crossing with the highway, and there is evidence tending to show that the guest had no control or direction over the driver of the car and that both the driver and the defendant's employee running the train were guilty of negligence which acting together proximately caused the injury in suit, the negligence of the driver of the car will not be imputed to the plaintiff's intestate and it is not contributory negligence barring the right of the administrator of the intestate from recovering against the railroad company, and the evidence is properly submitted to the jury on the question of the railroad company's negligence and proximate cause. *Smith v. R. R.*, 177.
2. Where in an action against a railroad company to recover damages for an alleged negligent personal injury there is evidence that the defendant's train was backed over a public highway crossing without giving any signal or warning and without a lookout on the rear of the train, and that it collided with an automobile in which the plaintiffs were riding as mere guests, and there is no evidence that the plaintiffs owned the car or had any control over the driver or were engaged in a common enterprise: *Held*, the evidence is sufficient to take the case to the jury on the issues of negligence and proximate cause, and the refusal to submit an issue as to the contributory negligence of the plaintiffs is not error, the negligence of the driver, if any, not being imputable to the plaintiffs. *King v. R. R.*, 398.
3. A driver of an automobile is required to look and listen for approaching trains before going upon a railroad grade crossing, and where the evidence tends to show that the plaintiff was riding with his

RAILROADS D b—*Continued.*

curtains up and that the collision with defendant's train was in broad daylight, and that the plaintiff had an unobstructed view of the track for 300 to 400 yards, except for a passing automobile, the defendant's motion as of nonsuit should be allowed. *Eller v. R. R.*, 527.

4. Where the evidence tends to show that the plaintiff negligently or without due regard for his own safety was personally injured in a collision of his automobile with defendant's train at a grade crossing in a town, the fact that there was also evidence of the failure of the defendant to give the usual signals required for the approach of a train to a crossing is not sufficient to deny the defendant's motion as of nonsuit, under the facts of this case. *Ibid.*
5. A railroad company will be held responsible only for such obstructions at a grade crossing as are under its control or management, and it will not be held responsible for an obstruction of plaintiff's vision by automobiles happening to pass at the time of the collision between the plaintiff's automobile with the defendant's train. *Ibid.*
6. Under the facts of this case the maintenance by the defendant railroad company of a guard rail three and one-half inches from the main rail, between which the wheels of plaintiff's automobile was caught, preventing him from turning off the track in time to avoid the collision, is held insufficient evidence of negligent construction of the guard rail. *Ibid.*
7. Although the failure of a railroad company to provide a watchman or signaling devices at a crossing may be considered by the jury in proper cases upon the question of negligence, the fact that a crossing is much used has not been held sufficient to raise the question, all cases holding that a watchman or signals should have been provided being where the crossing was obstructed by structures, curves, or peculiar conditions. *Ibid.*
8. In an action to recover damages against two defendants, a railroad company and Sinclair Refining Company station, there was evidence tending to show that a highway crossed the defendant railroad company's tracks at a populous and much traveled place near where the codefendant, operating a station, had a yard into which there was a spur track of the railroad company with tank cars thereon, with a pile of lumber and also advertising signs, obstructed the plaintiff's view of a train of the railroad company, fast approaching the crossing without giving warnings of any kind, so that the plaintiff, after having stopped his car, could neither see nor hear the approaching train until while attempting to cross the track the locomotive was upon him causing the injury in suit: *Held*, a demurrer upon the evidence did not prevail as to the defendant railroad company, but was good in favor of the defendant operator of the filling station. *Madrin v. R. R.*, 784.

c *Injuries to Persons on or Near Track*

1. A person who voluntarily sits for his own convenience upon a freight platform of a railroad company to watch the trains is a permissive licensee to whom the company is not liable except for injuries resulting from its wilful and wanton negligence, and evidence that the employees of the defendant in unloading a car left a plank,

RAILROADS D c—*Continued.*

used as a gangway, resting between the car and platform, and that the movement of the train dragged it upon and injured the plaintiff as he was sitting on the platform, and that he could have readily observed and avoided the danger, is *held:* not sufficient to take the case to the jury upon the issue of defendant's negligence, and its motion as of nonsuit should have been allowed. *Gibbs v. R. R.*, 49.

2. Allegations of the complaint in an action against a railroad company to recover for a personal injury alleged to have been negligently inflicted, that the defendant permitted children to ride on its freight trains by holding to the side ladders of the cars at a place in the city used by them as a playground, and that the injury resulted from the plaintiff being struck while so riding by a support to a bridge placed too near to the tracks for safety, are held insufficient to establish a breach of duty by the defendant, and its demurrer was properly sustained. *Andrews v. R. R.*, 483.

RECEIVERS—Of insolvent corporations see Corporations H b; of banks see Banks and Banking H; right of receiver to execute power of sale see Mortgages H h.

RECEIVING STOLEN GOODS.

D Trial.

d Verdict

1. Where the defendants are tried for storebreaking, larceny and receiving stolen property, and a verdict of guilty on the last count is rendered without a finding that the defendants knew the goods to be stolen at the time of receiving them, the verdict is fatally defective, and the defendants' motions, aptly made, to set aside the verdict or in arrest of judgment should be allowed, and a *venire de novo* will be ordered on appeal when the motions have been denied. *S. v. Beal*, 90.

RECORDARI see Justices of the Peace E b.

REFERENCE (Right to jury trial upon exceptions see Jury C a 1).

A Proceedings.

a Order of Reference and Power to Refer

1. The trial court may order a compulsory reference where an accounting is necessary for the information of the court before judgment or for carrying a judgment or order into effect. C. S., 573. *Cotton Mills v. Maslin*, 328.

d Power of Referee to Reopen Case

1. A referee has power to reopen a case still pending before him without final report made by him, with proper notice given the parties, and to permit the plaintiff to offer additional evidence, and when the evidence is then sufficient, his award in the plaintiff's favor sustained by the trial court will be sustained by the Supreme Court on appeal. *Adams v. Woodie*, 407.

2. Conceding in this case that the referee should have given ten days notice to the defendant of his intention to reopen the case before him, his exception only to the power of the referee to reopening the case is insufficient to show he was prejudiced on that account, and the judgment rendered adverse to him by the lower court will stand on appeal. *Ibid.*

REFERENCE—*Continued.*

C Report and Findings.

a Power of Court to Affirm, Modify, Set Aside, etc.

1. The Superior Court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. C. S., 578, 579. *Wallace v. Benner*, 124.

b Exceptions to Report

1. Where referee's findings are supported by evidence the overruling of exceptions thereto by trial court is not error. *Moore v. Brinkley*, 457.

REFORMATION OF INSTRUMENTS (Of insurance contracts see Insurance E c).

B Defenses.

a Innocent Purchasers

1. Where a senior and two junior mortgages are given on land erroneously described as lot forty-four of a certain plat, and foreclosure has been made under a power of sale in the senior mortgage and the controversy is by the holders of the junior mortgages over the surplus from the sale paid into the office of the clerk of the Superior Court, the powers of the courts of equity relate back to the beginning of the transactions in regard to reforming the instruments upon the ground of mutual mistake or fraud as to the identity of the lot, and it is error for the court to hold that this equity could not be invoked in the present case as the title to the lands was in the purchaser at the foreclosure sale, as the title of such purchaser is not questioned, the matter involved being the distribution of the surplus funds in the clerk's hands. *Sheets v. Stradford*, 36.

RELEASE see Torts C.

REMAINDERS—Right of life tenant to have property sold see Life Estates C a 1; remainders created by will see Wills C.

REMOVAL OF CAUSES.

D Citizenship of Parties.

a Amount in Controversy

1. The sum which the plaintiff in an action is entitled to recover is the amount to which he is entitled upon the allegation and proof, and not the amount prayed for in the prayer for relief, and where an action is brought on a five thousand-dollar policy of insurance, the complaint alleging upon information and belief that the amount recoverable was not less than three thousand dollars and praying judgment in the sum of three thousand dollars, and the plaintiff expressly refuses to waive or remit the amount of their claim in excess of three thousand dollars, the amount in controversy is within the jurisdiction of the Federal court, and the defendant's motion for removal of the cause from the State to the Federal court on the ground of diversity of citizenship should be allowed. *Smith v. Travelers Protective Asso.*, 740.

RULE IN SHELLEY'S CASE see Wills E c; Deeds and Conveyances C c 3.

SALES.

H Remedies of Buyer.

e Actions and Counterclaims for Breach of Warranty

1. Where a written warranty of sale of machinery is based upon a condition precedent, and it appears that the purchaser could not read

SALES H e—*Continued.*

or write, and that the warranty was not read to him by the seller's agent, the nonperformance of the condition is held not to bar his right of recovery on the warranty in this case. *Gin Co. v. Wise,* 409.

SCHOOLS AND SCHOOL DISTRICTS.

G Teachers.

a Election, Appointment and Term

1. The approval of the county superintendent of schools is required for the election of a teacher or assistant teacher in a non-local tax school district, and his refusal to approve the election of one on the ground that he did not have sufficiently high certificates as a teacher and that his election as a teacher would not be for the best interests of the school will not sustain the finding of the trial judge that the refusal of the county superintendent of schools to approve the election was arbitrary, captious and without just cause, and a mandamus to cause his approval is improvidently issued by the lower court. 3 C. S., 5533. *Cody v. Barrett,* 43.

SERVICE—Of process see Process; of case on appeal see Appeal and Error C a; of pleadings see Pleadings H b.

SET-OFF see Pleadings C.

SEWER SYSTEMS see Municipal Corporations E d.

STATES.

A Relation Between States.

a Conflict of Laws and Law of the Forum (Proof of Laws of another State see Evidence I a).

1. Where a contract is unlawful under the laws of this State, but lawful under the laws of another State wherein the contract was completed, every presumption is against an intention to violate the law, and it will be presumed that the parties contracted with reference to the laws of the State in which the contract would be valid. *Bundy v. Commercial Credit Co.,* 511.

2. Where a contract is in effect a loan of money contrary to our usury laws and is executed by the local agent of the lending corporation in North Carolina subject to the approval of the home office in another State where the rate of interest is permissible, the *lex loci* of the State where the contract was finally completed is controlling unless it was therein completed as a device to avoid the usury laws of this State, and whether it was so executed as a device to avoid our usury laws is a question of fact for the jury. *Ibid.*

3. A contract made at a permissible rate of interest in another State, but contrary to the usury laws of this State, when not a device to evade our law, is enforceable and is not considered as against public policy. *Ibid.*

4. Where a contract contains a stipulation that it should be governed by the laws of a certain State other than the State in which the contract is executed, and it appears that the parties did not contemplate the making or performance of the contract in the State

STATES A a—*Continued.*

whose laws are agreed to be controlling, the stipulation will be deemed immaterial. *Ibid.*

5. While a transitory cause of action may be maintained in the courts of a State other than the one in which it occurred, the *lex loci* is that of the State wherein the injury was inflicted, to be determined as a matter of law by the courts of the State wherein the action is brought by proper service on the defendant. *Howard v. Howard,* 574.

6. The right of a wife to maintain a transitory action against her husband to recover damages alleged to have been caused by his negligent act depends upon the laws of the State wherein the injury was alleged to have been negligently inflicted on her by him. *Ibid.*

7. Where the wife brings an action in this State to recover damages against her husband for negligent personal injury inflicted in another State, the common law will be presumed to exist in the foreign jurisdiction unless it is made to appear in evidence that it has been changed by statute. *Ibid.*

8. The law of the forum governs in transitory actions as to matters affecting the remedy, the rules of evidence, the burden of proof, and exceptions within the scope of private international law. *Ibid.*

9. In order to recover in a transitory action under the laws of the State wherein the cause of action arose the laws of that State must be pleaded as well as proven, and the courts of this State will not take judicial notice thereof. *Ibid.*

10. *Held,* in this action on a transitory cause of action brought in this State wherein the wife seeks to recover damages against her husband for an alleged negligent personal injury inflicted on her while traveling in an automobile with him in the State of New Jersey the statutes of that State relating to her separate property rights and the decisions of its courts introduced in evidence do not confer authority on her to maintain an action in tort against her husband. *Ibid.*

11. Under the common law a wife could not maintain an action in tort against her husband, and where the laws of another State applying this rule control in an action brought here, the recognition of its laws does not contradict any rule of public policy in our own State, although under our statutes such action could be maintained, nor does it result in any injustice to the citizens of this State, and such laws will be applied. *Ibid.*

E Claims Against the State.

a Consent to be Sued

1. The State of North Carolina has consented to liability for injuries to its employees other than the employees elected by the people or the General Assembly, or appointed by the Governor, whose injuries are compensable under the Workmen's Compensation Act. *Baker v. State,* 232; *Moore v. State,* 300; *Hagler v. Highway Commission,* 733.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTE OF LIMITATIONS see Limitation of Actions.

STATUTES.
  A Enactment, Requisites and Validity.
    c *General Rules in Respect to Validity*
      1. A statute will not be declared unconstitutional by the courts unless it manifestly violates some constitutional provision, and all doubt will be resolved in favor of its validity. *Chimney Rock Co. v. Lake Lure*, 171.

  B Construction and Operation.
    a *General Rules of Construction*
      1. While as a general rule definitions contained in an interpretative clause of a statute are a part of the act, their meaning will not be extended beyond their necessary import or be allowed to defeat the legislative intent otherwise therein clearly expressed. *Martin v. Sanatorium*, 221.

      2. Where there are clauses of a statute that are repugnant to each other and cannot be reconciled by reasonable interpretation the latter in place will repeal the former, but the section will be reconciled if possible by reasonable construction. *Ibid.*

  C Repeal and Revival.
    a *Repeal by Enactment*
      1. Where a general and special act are passed on the same subject, and the two are necessarily inconsistent, the special act will be construed as an exception to the general law unless the provisions of the general law necessarily exclude such construction, and in this case *Held:* the provisions of the Machinery Act of 1929 providing for a schedule of discounts and penalties on all taxes levied by "any county" of the State repeal a special act relating thereto, the word "any" as used by the Machinery Act being construed to mean "all." *R. R. v. Gaston County*, 780.

SUBMISSION OF CONTROVERSY see Controversy Without Action.

SUBROGATION.
  A Right to Subrogation.
    a *In General*
      1. Where a contract indemnifying the maker of a note against loss thereon is void as to the payee of the note on account of the operation of the statute of frauds, the payee may not claim to be subrogated to the rights of the maker under the contract of indemnity. *Bank v. Courtway*, 522.

    b *Right Thereto of Person Advancing Funds for Payment of Liens*
      1. Where money is advanced to discharge a mortgage encumbrance on land and the mortgage debt is thus discharged, the lender is not regarded as a mere volunteer, and is entitled under an agreement to an equitable assignment of the mortgage lien and holds the same in subrogation as against a lienor under a junior mortgage, and *held further*, that under the facts of this case the exceptions to the general rule of equitable subrogation do not apply. *Wallace v. Benner*, 124.

SUMMONS see Process.

SURETY BONDS see Principal and Surety.

SURRY COUNTY—Appointment of road superintendent for, see Highways C a 1.

TAXATION.

A Constitutional Requirements and Restrictions (Power of city to issue bonds and levy taxes see Municipal Corporations K a).

b Limitation on Tax Rate

1. The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act, Article V, section 6, and *held:* authority is conferred by C. S., 1297-8½, upon county commissioners to levy a tax for the special purpose of maintaining a home for aged and infirm and other similar institutions, and by C. S., 7075, for the special purpose of preserving the public health, but no authority is given to levy a special tax for the purpose of raising revenue for the maintenance of the county court and public welfare departments. *R. R. v. Lenoir County*, 494.

i Patent Rights

1. A State may not directly tax a patent right issued by the United States government, nor may it indirectly tax such patent right by taxing the income derived from royalties therefrom. *Maxwell v. Construction Co.*, 500.

j Poll Taxes

1. The provisions of our State Constitution limiting the right of a county to levy a poll tax in excess of two dollars on each person between specified ages is an inhibition of any excess and is mandatory and self-executing, and the levy of an excess thereof by a county in certain of its townships with the approval of the township voters under statutory authority declaring it to be levied in lieu of personal labor on the roads, but specifically denominating it a poll tax, is unconstitutional and void, and will be restrained by the courts. Constitution, Art. V, sec. 1. *Dixon v. Commissioners of Pitt*, 215.

2. The proportion between the property and the poll tax required to be observed by Constitution, Art. V, sec. 1, is entirely eliminated by the amendment of 1921, the amendment providing that such tax shall not be levied by a county in excess of two dollars, or by a city or town in excess of one dollar. *Ibid.*

B Liability of Persons and Property (Priority of tax lien in assets of insolvent corporation see Corporations H e 1).

d Property Exempt from Taxation

1. The mandate of the Constitution is clear and explicit that all real and personal property in this State shall be taxed by a uniform rule, allowing exemptions from taxation of Federal, State and municipal property and exemptions in the discretion of the Legislature in certain instances relating to religion, schools, charitable institutions, etc., and in cases allowing interpretation, the extent of the exemptions must be strictly construed in favor of the right to tax, and where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed

TAXATION B d—*Continued.*

among several beneficiaries of the class exempted by the Legislature, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and *held:* the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation. Const., Art. V, secs. 3 and 5. *Latta v. Jenkins,* 255.

2. There is no application of the doctrine of equitable conversion to the liability of property to taxation by the State or its political subdivisions, and property will not be exempted from taxation because the proceeds of sale thereof are to be used for religious purposes under the terms of a trust. *Ibid.*

3. When property is lawfully acquired by an incorporated town it is free from the burden of taxation by State or county by the express provisions of our State Constitution, Article V, section 5, regardless of the purpose for which it is used, and *held:* where a town acquires lands in another county of the State for the purpose of generating electricity thereon for the use of its inhabitants and others, the property is exempt from taxation by the county in which the land is situate, and statutes that provide that the property must be wholly for public or school purposes in order to exempt it from taxation are void if in conflict with the constitutional provision to the extent of such conflict, the constitutional provision being self-executing. *Andrews v. Clay County,* 280.

g Poll Taxes

1. The requirement of citizens to work upon the roads is not a capitation or poll tax, or a tax at all, but a duty imposed upon certain citizens within certain limits of age, but where an act levies a tax in certain townships upon a vote of its citizens, upon the males compellable to perform road work, and no choice is given between the personal work and the payment of the tax, the act levies a poll tax, and if the amount thereof is in excess of the constitutional limitation, it is void. *Dixon v. Commissioners of Pitt,* 215.

D Tax Liens.

b Date of Attachment of Tax Liens

1. The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless into whose hands the property has passed, C. S., 1220, 8003, unless barred by some statute of limitations, but there is no lien upon the personal property for taxes except from the date of levy thereon, C. S., 2815, and the provisions of C. S., 8006, require that the taxpayer, mortgagee or lien holder to point out personalty out of which taxes on real property may be paid in order to have the right that the personalty of the taxpayer be first used before resorting to the real estate. *Shale Products Co. v. Cement Co.,* 226.

E Collection, Enforcement and Remedies for Wrongful Levy.

b Enjoining Collection or Enforcement

1. Where a town ordinance imposes a license tax upon those selling at wholesale or peddling bakery products therein, and provides that

TAXATION E b—*Continued.*

its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, C. S., 7979, and equity will not enjoin the town from executing its threat to arrest the agent of the plaintiff every time the agent distributed bakery products in the town in violation of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. *Loose-Wiles Biscuit Co. v. Sanford*, 467.

2. Although injunctive relief against the collection of taxes will not ordinarily lie unless the tax itself is illegal or invalid, the remedy of the person assessed being to pay the tax under protest and bring action for its recovery, if circumstances are shown sufficient to invoke the aid of a court of equity, injunctive relief may be had, and in this case the evidence being to the effect that the defendant town had levied a tax under C. S., 7971 (56) on personal property of a partnership doing business therein, and had thereafter agreed with the partners that they were not liable therefor for the reason that they lived outside the corporate limits, and had not made further demand therefor until two years later when it undertook to compel the plaintiffs to pay back taxes for a period of five years: *Held*, sufficient to support the intervention of a court of equity, and judgment dissolving a temporary injunction is error. *Barber v. Benson*, 683.

H Tax Sales, Certificates and Foreclosure.

a Tax Sales and Certificates, and Rights and Remedies of Parties

1. Where the purchaser at a sale of lands for taxes, the county in this case, has received a tax sale certificate therefor, he has acquired an interest in or a lien upon the land so purchased with the only remedy of foreclosure by action as in case of a mortgage. *Orange County v. Jenkins*, 202.

b Requisites and Validity of Foreclosure of Tax Sale Certificates

1. The State as a sovereign power has the right to prescribe by statute the notice to be given to those interested in lands to be foreclosed under tax sale certificates except where the manner of notice interferes with the provisions of the Federal Constitution, and a statutory provision that substitutes notice by publication to be given in the newspapers as in an action *in rem* does not violate the "due process" clause of the Federal Constitution, and the purchaser at the judicial foreclosure sale, when fairly made in conformity with our statutory provisions acquires title free from the claims of those who may have an interest in the *locus in quo* who do not appear and defend their rights. C. S., 8037; Michie Supplement of 1929, Laws of 1927, ch. 221, Laws of 1929, chs. 204, 334. *Orange County v. Jenkins*, 202.

2. In proceedings to foreclose lands under the provisions of statute to subject them to the lien of a tax sale, it is not required that the courts should have obtained possession of the *locus in quo* by attachment or actual seizure of the property. *Ibid.*

3. Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands

TAXATION H b—*Continued.*

has been returned the defendant "not to be found," it is not required as under the provisions of C. S., 484, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service by publication. *Ibid.*

4. The lien for taxes can be enforced by the State or its political subdivisions under C. S., 7990, and no statute of limitations applies to the sovereign in such action, but where the State or its political subdivisions elect to proceed under C. S., 8037, the limitations therein prescribed apply. *Shale Products Co. v. Cement Co.*, 226.

I Forfeitures and Penalties.

a Failure to List Personalty for Taxation

1. The failure of the owner of personal property to list it for taxation does not deprive him of his right of action to recover damages from one who has negligently destroyed it. Michie Supplement to N. C. Code, sec. 2971 (185). *Nance v. Fertilizer Co.*, 702.

b Discounts and Penalties Based Upon Time of Payment

1. The public-local statute relating to the schedule of discounts to be allowed and penalties to be enforced in the collection of taxes in Gaston County is held to be repealed by the Machinery Act passed thereafter at the same session of the Legislature providing for a schedule of discounts and penalties on all taxes levied by "any" county of the State, and where a taxpayer has paid the penalty imposed by the special act in an instance where the Machinery Act imposes no penalty, he is entitled to recover the amount so paid in his action therefor. Ch. 256, Public-Local Laws 1929; ch. 344, Public Laws 1929. *R. R. v. Gaston County*, 780.

TORTS (Torts of municipal corporations see Municipal Corporations E; laws governing transitory cause brought in courts of this State see States A a 5, 6, 8, 10, 11; admissibility of acts or declarations of joint *tort-feasor* see Evidence D i; father's liability for torts of minor son see Parent and Child A a; nuisance see Nuisance; negligence see Negligence, Railroads, Master and Servant, Highways, Waters and Water Courses, and particular heads).

C Release from Liability.

c Mental Capacity to Execute

1. The burden is on the plaintiff who has signed a release to prove his mental incapacity to have executed it when relied upon by him to set the release aside. *Mangum v. Brown*, 296.

2. Where the plaintiff seeks to set aside his release of the defendant from the consequences of the latter's negligence, evidence that before the injury the plaintiff's mind had been normal and that at the time of the trial and previously he talked and acted like a child, that his memory and business capacity had failed him, is sufficient to take the case to the jury upon the question of plaintiff's mental incapacity at the time he signed it. *Ibid.*

3. Where the issue as to the mental capacity of the plaintiff to execute a release binding upon him has been found by the jury in the plaintiff's favor, the answer to the issue relating to undue influence becomes immaterial. *Ibid.*

TRIAL (References see Reference; right to trial by jury see Jury C; trial of particular proceedings and actions see Particular Heads; trial of criminal actions see Criminal Law I).

A Time of Trial, Notice, and Preliminary Proceedings.

b Continuance

1. Where proceedings against the State Highway Commission for damages for the taking of petitioner's land have been had without notification to the Commission as to the appointment of appraisers, confirmation of the appraisers' report and transfer of the issue to the civil issue docket for trial, an order of the court continuing the trial for the defendant's attorneys not being able to attend at the time set for trial upon condition that defendant waive technical objections, pay costs, etc., is contrary to the usual course and practice of the courts. *Flinchum v. Doughton*, 770.

B Reception of Evidence.

c Objections and Exceptions

1. Exceptions to the admission of certain evidence upon the trial will not be sustained when testimony of substantially identical import has been introduced without objection. *Bank v. Florida-Carolina Estates*, 480; *Nance v. Fertilizer Co.*, 702; *Indemnity Co. v. Perry*, 765.

e Withdrawal of Evidence

1. Where the motion to strike out the answer of a witness to a question is allowed, reversible error will not be held on exception to the failure of the trial court to charge the jury not to consider it, there being no special request therefor, and the failure to give such instruction not being prejudicial. *Nance v. Fertilizer Co.*, 702.

C Conduct and Course of Trial (Contempt of court see Contempt).

a Arguments to the Jury

1. In an action against joint *tort-feasors* involving the issues of negligence, contributory negligence, and assumption of risks, wherein one only introduces evidence, the other not introducing evidence is not entitled, as a matter of right, to the opening and concluding speech to the jury under the provisions of Rule 3 of our practice, and a refusal of this request by the trial judge will not be held for error. *Hamilton v. R. R.*, 543.

D Taking Case or Question from Jury.

a Nonsuit (In criminal actions see Criminal Law I j; in actions for negligence on highway see Highways B j; nonsuit as bar to subsequent action see Judgments L a; after refusing motions for, court may not set aside verdict for insufficient evidence see Trial G a).

1. Upon defendant's motion as of nonsuit all the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment therefrom, and every reasonable inference in his favor. *Murphy v. Coach Co.*, 92; *Hill v. Insurance Co.*, 115; *Smithwick v. Pine Co.*, 519; *Hamilton v. R. R.*, 543; *Nance v. Fertilizer Co.*, 702; *Madrin v. R. R.*, 784.

2. Where there is more than a scintilla of evidence defendant's motion as of nonsuit should be denied. *Mangum v. Brown*, 296.

3. Where the answer pleads a counterclaim the plaintiff may not take a voluntary nonsuit over the defendant's objection. *Insurance Co. v. Griffin*, 251.

TRIAL D a—*Continued.*

4. Where a defendant makes a motion as of nonsuit at the close of the plaintiff's evidence, and upon the motion being overruled, introduces evidence in his own behalf, he waives his right to present the question of the sufficiency of the evidence to go to the jury by failing to renew his motion at the close of all the evidence, and his appeal will be regarded as if no motion had been made by him. C. S., 567. *Lee v. Penland*, 340.

5. Where there is evidence to support defendant's counterclaim set up by him in his answer to the complaint the plaintiff's motion to dismiss the cross-action thereon is properly denied. *Gin Co. v. Wise*, 409.

b Directed Verdict

1. Directed verdict in favor of party upon whom burden of proof is error. *Bank v. McCullers*, 591.

E Instructions.

c Form, Requisites and Sufficiency

1. Where the determination of the controversy admittedly depends upon the jury's answer to an issue of fraud, exception to the charge of the court on the grounds that it unduly emphasized this issue will not be sustained on appeal when the record does not disclose that the trial judge abused his discretion in the manner of arraying contentions or stating propositions of law. *Bank v. Florida-Carolina Estates*, 480.

e Requests for Instructions

1. Where the complaining party is not satisfied with an instruction by the court to the jury as being sufficiently specific, and the instruction is substantially correct as to the law, his remedy is by offering a prayer for instructions in accordance with his view on the subject. *Roberts v. Davis*, 424.

f Objections and Exceptions

1. Where the trial judge incorrectly states the contentions of the parties it is the duty of the party claiming error therein to call it to his attention in order to afford him an opportunity for correction. *Bank v. Florida-Carolina Estates*, 480.

g Construction of Instructions and General Rules Upon Review

1. When the charge of the judge to the jury is correct when considered as a whole it will not be held for reversible error if certain matters therein, taken disjointedly therefrom, may not be technically correct. *Murphy v. Coach Co.*, 92.

2. Where upon the trial of the issue of *devisavit vel non* the trial judge in his instructions to the jury first correctly places the burden of proof on the caveators, and later on the propounders, the instructions are conflicting upon a material matter, and prejudicial to the propounders, constituting reversible error. *In re Will of Brown*, 440.

3. An instruction of the trial judge to the jury upon the liability of a father under the "family car" doctrine for his minor son's negligence in causing an injury to another is not held for prejudicial

TRIAL E g—*Continued.*

error in this case because of the use of the words "driven by the son on various occasions," it being admitted that the son had been driving the car for more than two years, and it thus appearing that the jury must have understood he was referring to his habitually and customarily driving it. *Grier v. Woodside*, 759.

h Additional Instructions and Redeliberation

1. The mere fact that the trial judge recalled the jury of his own motion to give them additional instructions after the case had been given them, and in the absence of counsel, is no ground for exception where there is no contention that the supplemental instructions were erroneous in law. *Bank v. Florida-Carolina Estates*, 480.

F Issues (Conformity of judgment to, see Judgments F c).

a Form and Sufficiency

1. Where there is no evidence to support issue tendered refusal to submit such issue is not error. *Bank v. Furniture Co.*, 371; *King v. R. R.*, 398.

2. Where the amount alleged to be due by contract is a mere matter of calculation from the other undisputed evidence in the case, the refusal of the court to submit an issue tendered thereon is not reversible error, where the controversy is determined by the answer of the jury to the issue submitted. *Indemnity Co. v. Perry*, 765.

b Conformity to Pleadings

1. In this case *held:* plaintiff alleged action for fraud and issues tendered by defendant were correct. *Home Building v. Nash*, 430.

G Verdict.

a Setting Aside Verdict

1. Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, but may do so only as a matter within his discretion. *Godfrey v. Coach Co.*, 41; *Lee v. Penland*, 340; *Price v. Insurance Co.*, 427.

2. Where during the trial the judge refuses at the close of plaintiff's evidence his motion for a directed verdict in his favor, and again does so at the close of all the evidence, he may not after verdict in defendant's favor grant plaintiff's motion as a matter of right to set aside the verdict, the case being analogous to the statutory right given a party to move for judgment as of nonsuit, it appearing that the trial judge did not set aside the verdict as a matter within his discretion. *Mewborn v. Smith*, 532.

3. Where the trial court sets aside the verdict as a matter within his discretion no appeal will lie therefrom, and in such cases it is not necessary that he should find the facts. *In re Beal*, 754.

b Form and Sufficiency of Verdict

1. Where the jury's answer to the issues submitted are conflicting in their result, or are not determinative of the controversy, on appeal from a judgment entered thereon a new trial will be granted. *Plotkin v. Bond Co.*, 590.

TRUSTS (Trustee is necessary party in action to declare mortgage on trust property given by him invalid see Parties B a 1; lessee of trustee not required to see to proper application of rent see Landlord and Tenant H b).

A Creation and Validity.

b Resulting Trusts

1. Where a wife conveys land owned by her to a corporation in consideration of shares of stock of the corporation, and she dies owning such stock, and after her death the corporation is dissolved, and her husband, who was entitled to only one-sixth of her estate as distributee, transfers the stock back to the corporation as consideration for a deed to the land from the corporation to him in his own right: *Held,* a resulting trust attaches to the land in favor of the heirs at law of the deceased wife for the other five-sixths interest. *Miller v. Miller,* 458.

2. Where lands are purchased with the money of the wife and deed made to the husband and wife for life with remainder to the son of the wife, a resulting trust in favor of the wife will be created, and her conveyance of the timber standing thereon is valid. *Wise v. Raynor,* 567.

3. Where a deed to lands is made to the husband and wife for life with remainder over, the conveyance reciting that the purchase price was paid by both, evidence is competent to establish a resulting trust in her favor that at the time the deed was being prepared that she told the draftsman in the presence of her husband that she was furnishing the money from her separate estate and that the full title was to be conveyed to her, and testimony of a disinterested witness to the same effect is competent to corroborate her testimony. *Ibid.*

F Appointment and Tenure of Trustees.

a Appointment, Qualification, Failure to Qualify and Appointment of Substitutes

1. Where only one of two trustees appointed by will has qualified and acts as such, courts of equity will not appoint another, the presumption being that the testator desires the trust to be administered by the trustee he appointed alone rather than have another appointed by the courts to act with him. *In re Estate of Smith,* 272.

USURY (As grounds for enjoining foreclosure see Mortgages H b).

A Usurious Contracts and Transactions (Applicability of laws of another State permitting greater charge of interest see States A a).

a Construction of Contracts or Transactions as to Usury

1. Where a credit corporation under a "covering agreement" agrees to "purchase" the accounts of a wholesale corporation "as may be acceptable" and to pay therefor one hundred per cent of their face value less certain charges, though denominating itself a purchasing contractor, it is in effect a loan of money and is condemned by our usury statute when a greater rate than 6 per cent is charged for the money advanced or loaned. *Bundy v. Commercial Credit Co.,* 511.

USURY A—*Continued.*

b Effect and Liabilities

1. Where the payee of a promissory note or bond brings action thereon and the defendant sets up a deduction on account of usury, the two-year statute of limitations will not bar his defense, and within the plain intent and meaning of the statute the plaintiff will not be entitled to recover the usurious charge. Actions brought to recover usurious interest distinguished. C. S., 442(2), 2306. *Pugh v. Scarboro,* 59.

2. The plaintiff in his action to recover for usurious rate of interest paid and received by the lender is entitled to recover double the amount of the interest so paid and received, and an instruction to the jury that fails to give him this right (C. S., 2306) is prejudicial to him and is reversible error. Admissions in this record held insufficient as a basis for a directed verdict of a specific amount. *Bundy v. Commercial Credit Co.,* 511.

3. Usurious rate must be actually paid in order to sustain action for statutory penalty. *Clark v. Bank,* 635.

C Actions.

a Pleadings

1. A complaint in an action to recover twice the amount of an usurious rate of interest is demurrable if there is no allegation that such interest had been actually paid, and in this case held that allegations that defendant charged and received usury on a note discounted by plaintiff with defendant is insufficient to sustain the action for the statutory penalty. *Clark v. Bank,* 635.

b Evidence and Proof

1. No device to avoid our usury statute will be permitted to defeat its purpose, and in an action to recover on a promissory note or bond appearing on its face to be given for a lawful rate of interest, it may be shown by parol that an amount called a bonus had been deducted, and when this bonus has not been received by the payee the maker of the note may set up the usury statute, and the plaintiff in the action upon the note will forfeit the amount of the bonus regarded as interest, and making the transaction an usurious one. *Pugh v. Scarboro,* 59.

WATERS AND WATER COURSES.

C Surface Waters, Dams, Ponds and Streams.

c Pollution (Sewer systems see Municipal Corporations E d).

1. In an action against a fertilizer company to recover damages for the killing of plaintiff's hogs, evidence that defendant dumped chemical refuse from its plant on a slope draining into the waters of a creek which overflowed the plaintiff's pasture, with further testimony of experts that the ingredients of the dump were poisonous, and that mud from the plaintiff's pasture contained the same chemicals, and that the death of plaintiff's hogs was due to such poison, is *held:* sufficient to be submitted to the jury on the issue of defendant's actionable negligence. *Nance v. Fertilizer Co.,* 702.

2. Where the defendant's septic tank overflows and pollutes a stream the plaintiff may recover damages proximately caused thereby. *Little v. Furniture Co.,* 731.

WATERS AND WATER COURSES C c—*Continued.*

3. Where the defendant's septic tank has overflowed and polluted a stream, proximately causing damage to the plaintiff's land, the defendant is liable therefor, although the stream may have been polluted from other sources also, and the plaintiff is entitled to have the jury assess such damages as proximately flowed from the defendant's wrong. *Ibid.*

WEAPONS—Concealed see Concealed Weapons; assault with deadly, see Assault and Battery B c; presumption from killing with deadly, see Homicide G b.

WILLS.

B Contracts to Devise.

a Requisite and Validity

1. A written agreement made with consideration contemporaneously with the execution and delivery of notes secured by a mortgage, that the obligor be absolutely released as to the obligee or her estate upon her death is valid. *Moore v. Brinkley*, 457.

b Actions on Contracts to Devise

1. In an action against the estate of the decedent to recover for services rendered upon the promise of the decedent to devise his lands in compensation, testimony as to the value of the lands *is held* competent upon the question of the value of the services rendered decedent. *Lewis v. Mitchell*, 652.

D Probate and Caveat.

c Burden of Proof in Caveat Proceedings

1. Where a will is caveated on the ground of mental incapacity the burden of proof is on the caveators alleging it to establish the invalidity of the will on this ground. *In re Will of Brown*, 440.

h Evidence in Caveat Proceedings

1. In an action involving the mental capacity of a testator to make the will in controversy, there being evidence that he had been committed to a hospital for the insane, with further evidence that he had been discharged as cured, C. S., 6214: *Held*, the admission of evidence to the effect that he had since served on the jury in the trial of several cases without indication that it was to be followed by testimony as to capacity to serve is reversible error. *In re Will of Crabtree*, 4.

2. Where it is shown that the testator upon the caveat of his holographic will has been committed to an insane asylum: *Held*, upon the issue of his testamentary capacity an instruction that "a will duly probated in accordance with the formalities of law is presumed to be valid" is not objectionable, there being no presumption of mental incapacity by reason of the commitment in the asylum when it has been shown that the testator had been discharged as restored or cured by a certificate issued in accordance with the provisions of C. S., 6214. *Ibid.*

E Construction and Operation.

a General Rules of Construction

1. In construing wills the courts will endeavor to ascertain the intent of the testator as expressed in the words used, and in cases of doubt

WILLS E a—*Continued.*

resort may be had to the usual canons of interpretation, and a devise will be construed to be in fee unless it appears from the will that the testator intended to convey an estate of less dignity, C. S., 4162. *Bell v. Gillam,* 411.

2. The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by C. S., 4162, providing that a devise of real estate shall be construed to be a devise in fee simple unless the will by plain and express words indicates an intention to convey an estate of less dignity. *Henderson v. Power Co.,* 443.

b Estates and Interests Created

1. A devise of lands "(a) to the children of my son I give, subject to the reservation hereinafter named, the following lands . . . (b) the said children to hold these lands during their life, subject to a reservation hereinafter named, and on their death shall go to their children, etc. . . . (c) the said children shall hold these lands as shall their children, subject to the right of my son to the use of the lands cultivatable for his personal use so long as he shall live, . . . but in the event the title to the use shall in any way pass out of his hands, immediately the fee shall vest in his children": *Held,* to create a life estate to the children of the son, subject to his right to use all the land capable of cultivation so long as he shall live, on condition that the children's life estate shall be converted into a fee simple upon the title to the use passing out of the hands of the son. *Bell v. Gillam,* 411.

2. Where a will devises to the children of the testatrix certain lands to be equally divided between them, and by later item provides that if any of the children should die without leaving legitimate issue his or her share should go to the surviving children or grandchildren of the testator: *Held,* the will devises the fee to the children as tenants in common, defeasible upon their dying without legitimate issue them surviving. *Henderson v. Power Co.,* 443.

3. A devise of lands to a certain son of the testator "and his bodily heirs," and if no bodily heirs then to the testator's heirs and assigns does not pass to the son an indefeasible fee-simple title to the lands described, the condition referring to the son's death with bodily heirs him surviving. *International Agricultural Corp. v. Johnson,* 465.

c Application of Rule in Shelley's Case and Estates Created Thereunder (See, also, hereunder E b 3).

1. A devise to testator's wife of all his real property with power of disposition over all or a part of the same, and the part not so disposed of to his daughter for her life and at her death to the "heirs of her body": *Held,* upon the death of the wife without any disposition of the property the title to the lands vests in the daughter in fee simple under the rule in *Shelley's case,* the naked power of disposition to the wife not affecting the result. *Helms v. Collins,* 89.

2. A devise to the grandson of the testator to have and to hold during the term of his natural life, and no longer, and after his death to

WILLS E c—*Continued.*

his bodily heirs in fee simple, but if he should die without issue, the remainder over to designated persons, creates a fee simple in the grandson under the rule in *Shelley's case*, subject to be defeated upon his death without issue. *Williams v. R. R.*, 771.

d Vested and Contingent Estates and Interests

1. Where a will devises a remainder to a class the remainder vests in right, but not in amount or quantity, in such of the class as are *in esse* before the termination of the particular estate, and where the particular estate is determined by the happening of an event other than the death of the tenant of the particular estate, the fee immediately vests in those of the class *in esse* at the time of the termination of the particular estate, and in this case the granddaughter of the testator takes the remainder in fee without awaiting the death of her father, the tenant of the particular estate. *Bell v. Gillam*, 411.

2. Where a will creates a limitation over in the event that the first taker of the fee should die without issue, the event refers to the death of the first taker of the fee, and upon his death the estate immediately vests absolutely in the contingent remaindermen. *Henderson v. Power Co.*, 443.

3. Where a will devises property to the children of the testatrix as tenants in common and by later item provides that in the event of any of the children dying without legitimate issue them surviving the share of such child "shall go to such of my surviving children or grandchildren" as might be selected by the devisee: *Held*, the intent of the testatrix was to give her children and grandchildren the beneficial use of the property, and the devise is unequivocal and the intent is controlling, and the position that the later item does not affect the estate created by the prior item because the later item is not imperative, cannot be maintained. *Ibid.*

f Designation of Devisees and Legatees and Their Respective Shares

1. In construing a will regard will be given the language employed to effectuate the testator's intent, and where he has devised a certain part of his lands to his adopted son where he may select, and directs that the residue of his property, real and personal, be sold and the proceeds paid to his two sons "one-half that remains to D. and A. remaining money": *Held*, as to the personalty the two sons were the primary objects of the testator's bounty, and the money from the sale was to be divided between them after payment of debts and a tombstone as directed by the will, to the exclusion of the adopted son, and the further expression "kept on expenses after all debts are paid," evidently intended expense of necessary upkeep of livestock and the like until the sale could be made. *Groce v. Groce*, 27.

h Estates in Trust and Power of Appointment

1. As a rule equity will not aid the nonexecution of a mere power of appointment, but where the power is in the nature of a trust, equity will execute the power, and where the devise is to the children of the testator, and in the event that any one of them should die without issue him surviving, his share should go to the other

WILLS E h—*Continued.*

children or grandchildren of the testatrix as selected by the will of the child dying without issue, and one of the children dies without issue and without exercising the power: *Held*, equity will apportion the property equally to all the members of the class described in the will. *Henderson v. Power Co.*, 443.

2. Devises of property in trust to individual trustees by name for the purpose of "keeping up preaching" in a designated church and in churches of weak financial condition, and for "home missionary work" are held not to be void for indefiniteness, the purposes of the devises being sufficiently described and the trustees named therein being trustees of a religious organization whose duties relate to distribution of such funds. *Whitsett v. Clapp*, 647.

F Rights and Liabilities of Devisees and Legatees.

a General and Specific Devises and Bequests

1. Upon construing a will to effectuate the testator's intent, a bequest to a son of a certain sum of money and the residue, consisting of real and personal property, to a daughter: *Held*, the specific bequest to the son will be paid and deducted from the proceeds of the sale of the lands to make assets, the personalty being insufficient, so that the son may receive the amount of money specifically bequeathed to him. *Litaker v. Stallings*, 6.

c Advancements

1. An advancement by a father to his son is a gift *in præsenti* or provision made by the father on behalf of his son for the purpose of advancing him in life and enabling him to anticipate his inheritance to that extent. *Edgerton v. Perkins*, 650.

h Lapsed and Void Devises and Bequests

1. Where a daughter of the testator is devised and bequeathed the residue of the estate real and personal after a bequest of a specific sum of money to a son, and the daughter predeceases her father, the legacy lapses and the intent of the testator may be ascertained by striking out the name of the daughter and inserting in lieu thereof the names of those entitled to take, whether by descent or under the will. *Litaker v. Stallings*, 6.

WITNESSES (Impeaching, corroborating, etc., see Evidence D f, Criminal Law G r; privileged communications see Criminal Law G q).

A Attendance and Compensation.

c Amount of Compensation of Expert Witnesses

1. The amount to be paid an expert witness testifying at a hearing before a commissioner of the Industrial Commission in proceedings before him under the Workmen's Compensation Act is a question to be determined in the discretion of the court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. C. S., 3893. *In re Hayes*, 133.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

WRONGFUL DEATH see Death B.

ZONING ORDINANCES see Municipal Corporations H b.